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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

IN RE VICTOR E. MURGO

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, AND THE HONORABLE WALTER E. HOFFMAN, SENIOR JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, SITTING BY DESIGNATION AT THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

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February 8, 1985

QUESTION PRESENTED

Does reconsideration by a trial judge of a duly entered judgment of acquittal that was based on insufficiency of the evidence, where such reconsideration required preparation and submission to the court of transcripts of certain witnesses' testimony, offend the Double Jeopardy Clause of the Fifth Amendment?

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No. 84-____

IN THE

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OCTOBER TERM, 1984

IN RE VICTOR E. MURGO

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION, AND THE HONORABLE WALTER E. HOFFMAN, SENIOR JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, SITTING BY DESIGNATION AT THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION

Petitioner respectfully prays that writs of mandamus and prohibition issue to the United States District Court for the Middle District of Florida, Orlando Division and the Honorable Walter E. Hoffman, Senior Judge of the United States District Court for the Eastern District of Virginia, sitting by designation at the United States District Court for the Middle District of Florida, Orlando Division, (1) ordering Judge Hoffman to reinstate the judgments of acquittal entered May 11, 1983 with respect to petitioner in the case of *United States v. Victor E. Murgo, et al.*, No. 82—67—Orl—Cr—R(H) and (2) prohibiting Judge Hoffman from taking any action to sentence or confine petitioner in connection with said case. The sentencing is now set for February 23, 1985. *See* Appendix A at A-47.

The actions of the District Court which this petition seeks to remedy raise important Fifth Amendment and jurisdiction questions with respect to a trial judge's power to reopen for reconsideration a duly entered judgment of acquittal entered pursuant to the trial court's finding that the evidence adduced at trial was insufficient to support a conviction of the crime charged in the indictment.

THE OPINIONS BELOW

The Orders and Memoranda of the District Court, review of which is sought by this petition, are set forth fully in Appendix A. The orders of the Court of Appeals for the Eleventh Circuit, denying therein the relief sought by this petition, are set forth fully in Appendix C.

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. 1651(a), to confine the District Court to the proper exercise of its jurisdiction in criminal cases within the limitations imposed by the Fifth Amendment to the Constitution. In addition, this Court has jurisdiction under Section 1651(a) to exercise general supervisory control over inferior federal courts. *Will v. United States*, 389 U.S. 90, 107 (1967) (writ serves a "vital and didactic function"); *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *LaBuy v. Howes Leather Co.*, 352 U.S. 249 (1957). Such exercise of the Courts supervisory authority is particularly appropriate where, as here, the inferior court has taken action which undermines important constitutional protections afforded to citizens once acquitted of charges leveled against them by the government.

CONSTITUTIONAL PROVISION INVOLVED

The Double Jeopardy Clause of the Fifth Amendment to the Constitution, which states: "[N]or shall any person be subject

for the same offence to be twice put in jeopardy of life or limb''.

QUESTION PRESENTED

Does reconsideration by a trial judge of a duly entered judgment of acquittal that was based on insufficiency of the evidence, where such reconsideration required preparation and submission to the court of transcripts of certain witnesses' testimony, offend the Double Jeopardy Clause of the Fifth Amendment?

STATEMENT OF THE CASE

This petition arises out of a criminal prosecution in the United States District Court for the Middle District of Florida, Orlando Division, before Senior Judge Walter E. Hoffman, sitting by designation. Petitioner, an international financial advisor, was tried, along with thirteen co-defendants, on charges of mail fraud and conspiracy to commit mail fraud.

On March 30, 1983, after a ten-week trial, the jury returned guilty verdicts as to petitioner and most of the other defendants on various counts in the indictment. Petitioner timely moved the trial court pursuant to Rule 29(c), Fed. R. Crim. P., to set aside the jury verdict and to enter judgment of acquittal with respect to all counts in the indictment. After carefully reviewing petitioner's motion and the government's opposition, the trial judge granted petitioner's motion in a Memorandum and Order dated May 11, 1983. *See* Appendix A at A-1.

Subsequently, the trial judge, in an extraordinary Supplemental Memorandum, indicated that he had intended to grant petitioners motion for judgment of acquittal as to two counts of the indictment and to grant petitioner a new trial as to the other counts. *Id.* at A-6. The Supplemental Memorandum recognized, however, that such a post-acquittal clarification was

irregular and could have no effect on the prior acquittal, noting that "whether a correction may now be made by this Court without raising serious jeopardy problems is doubtful." *Id.* Consequently, the trial judge entered no order carrying out his stated intentions, but "invite[d] reversal of the appellate court."[1] *Id.* at A-8.

Despite the trial court's articulated concern with respect to the double jeopardy problem, and invitation to the government to appeal the May 17 acquittals, the government moved on June 10, 1983 for reconsideration of the May 11, 1983 Memorandum and Order.[2] *See* Appendix B at B-2. Over petitioner's strenuous objection, that motion was granted and the court continued the matter for further hearing. *See* Appendix A at A-9. The court further ordered the preparation, and submission to it, of transcripts of testimony bearing on the issues to be "reconsidered." *Id.* at A-10.

Over a year later in an August 20, 1984 Memorandum, the trial court concluded that "its original entry of the Judgment of Acquittal was in error" and that the evidence was sufficient against petitioner on all counts. *Id.* at A-17, 40. The Court stated it would vacate its judgments of acquittal and reinstate

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[1] It is clear from the procedures subsequently employed that the District Court, in issuing its Supplemental Memorandum, was not simply attempting to correct a ministerial error, but was instead revisting and reconsidering the issues it had resolved against the government on May 11, 1983.

[2] Before moving for reconsideration, however, the government re-indicted petitioner and caused him to be arrested, at gunpoint, in front of members of his family, by officers who had broken into his home. He was then taken to jail. The United States attorney reluctantly moved to dismiss the new indictment on June 24, 1983 "upon instructions from Acting Assistant Attorney General, John C. Keeney, declining to give discretionary authority to proceed on successive prosecution of" petitioner. *See* Appendix B at B-1.

the convictions of petitioner.[3] *Id.* at A-41. On January 28, 1985, the trial court issued an order enforcing its opinion of August 20. *Id.* at A-46. The Court has set sentencing for February 23, 1985. *Id.* at A-47.

REASONS FOR GRANTING THE WRITS

THE RELIEF SOUGHT BY PETITIONER IS NOT AVAILABLE FROM ANY OTHER COURT

Subsequent to the trial court's August 20, 1984 Memorandum, petitioner sought relief similar to that sought here in the Court of Appeals for the Eleventh Circuit. By Order dated October 15, 1984, that court denied the petition without opinion or explanation. *See* Appendix C at C-1. Petitioner sought rehearing and suggested rehearing *en banc* on November 30, 1984 after receiving from the Court of Appeals a clarification stating that the court had relied on *United States v. Dieter*, 429 U.S 1330 (1976) in denying his prior petition.[4] *Id.* at C-2. Rehearing was denied on December 19, 1984. *Id.* at C-3. The Court of Appeals then refused to accept petitioners application to stay the sentencing. *Id.* at C-5.

In addition, petitioner is precluded from seeking immediate review in the Court of Appeals under 28 U.S.C. §1291 by virtue of the unusual nature of the trial court's orders subsequent to the May 11, 1983 acquittal. Although petitioner contends

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[3] In the Supplemental Memorandum in which the District Court first reconsidered its actions of May 11, 1983, the Court announced its intention to acquit petitioner on two counts and grant him a retrial on the remaining counts. Thus, the court first acquitted petitioner on all counts, then said it intended to acquit him on some and grant him a new trial on others, and then reinstated his conviction on all counts.

[4] The Circuit Court's reliance on *United States v. Dieter* was misplaced. *Dieter* deals with whether motions for reconsideration of pretrial, interlocutory orders toll the time limit for a government appeal. Petitioner does not seek to preclude the court from reconsidering pretrial, interlocutory orders of the type involved in *Dieter*; he seeks only to compel the trial court to respect the finality of a judgment of acquittal.

that the May 17 Order entering a judgment of acquittal on all counts was final because it "terminate[d] the litigation . . . on the merits" and left "nothing to be done but to enforce by execution what has been determined",[5] the District Court has treated its judgment of acquittal as an interlocutory order. In each of its subsequent orders the District Court purported to retain jurisdiction over the case and scheduled further proceedings. *See generally* Appendix A. Petitioner will be forced to endure the indignities of sentencing and potential incarceration before he will be able to perfect a Section 1291 appeal. Because of his wife's precarious health and the destructive effect of a sentencing on his business, allowing petitioner to be sentenced, following his acquittal, is manifestly unjust. There is, thus, no forum other than this Court, and no procedure other than this petition, by which petitioner can seek to remedy the extraordinary wrong he is being forced to endure.

EXTRAORDINARY RELIEF IS REQUIRED TO PREVENT COMPOUNDING OF THE WRONGS DONE TO PETITIONER

After being indicted, petitioner endured a ten week trial which was terminated by the trial court's ordering on May 11, 1983 that he be acquitted on all counts. *See* Appendix A at A-5. More than eighteen months later, petitioner still remains under a trial bond, still must report to the government whenever he travels for business or pleasure, and still must live under the cloud of a criminal prosecution.

Moreover, it is the government's peculiar choice of procedure that has backed petitioner into this extraordinary corner.

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[5] *Berman v. United States*, 302 U.S. 211, 212-13 (1937). *See also, Yeloushan v. United States*, 313 F.2d 303 (5th Cir.), *cert. denied*, 373 U.S. 912 (1963). Indeed petitioner's position is that because an order of acquittal is a final order, the District Court lost jurisdiction as soon as that order was entered. The government must then seek relief by appeal within 30 days pursuant to 18 U.S. §3731.

Rather than appeal from the trial judge's May 11, 1983 Memorandum and Order and gain a quick determination on the merits of its position, the government has chosen to wear petitioner down with a form of slow torture, trial *de novo* process — first a motion for reconsideration; then submission of transcripts and briefing; then actual reconsideration; then presentencing procedures; and then sentencing — before any supervisory court has the opportunity to review the peculiar facts of this case.

Indeed, it is most revealing that before even seeking reconsideration by the trial court, the government chose to pursue petitioner in another fashion — by starting all over again. Shortly after being acquitted, petitioner was indicted yet again, arrested at gunpoint in front of members of his family by officers who had broken into his home, and promptly tossed in jail. It was left to the Acting Assistant Attorney General in charge of the Criminal Division to decline to authorize a second prosecution of petitioner and to order the United States Attorney to move to dismiss the second indictment. *See* Appendix B at B-1. Had the United States Attorneys office sought Department of Justice approval prior to subjecting petitioner to re-indictment, arrest and incarceration, petitioner would have been spared those indignities.

Next, the government attempted to reopen its initial prosecution through a Motion for Reconsideration filed on June 10, 1983, after the trial judge's order acquitting petitioner. *See* Appendix B at B-2. After granting this motion, the Court reconsidered certain portions of the trial evidence. If the government had asked to resubmit evidence and reargue its case following a jury verdict of not guilty, such a procedure would have been rejected out of hand as a clear violation of double jeopardy. But the government followed a precisely analogous procedure in resubmitting its case to the trial judge.

As a result, petitioner has suffered not only what was in effect a new trial, but also has undergone fifteen months in

limbo, suspended between a verdict of not guilty and the possibility of a sentence. He has suffered all the consequences which the rule against placing a person twice in jeopardy was created to prevent.

The prohibition against double jeopardy was originally intended to protect the finality of judgments, a concern similar to that underlying the doctrine of *res judicata*. *See Crist v. Bretz*, 437 U.S. 28, 33 (1978). In return, the policy of finality also protected a defendant from government oppression. *See United States v. Scott*, 437 U.S. 82, 99 (1978). The classic formulation of the purpose of the double jeopardy clause is set forth in *Green v. United States*, 355 U.S. 184, 187-88 (1957):

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

See also United States v. Scott, 437 U.S. at 99.

The latter concern expressed in *Green* — protection of the innocent from the increased chance of conviction which inevitably arises from repeated trials on the same charges — is central to interpretation of the clause and determination of its scope. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that [a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy." *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), quoting *United States v. Ball*, 163 U.S. 662, 671 (1896). *See United States v. DiFrancesco*, 449 U.S. 117 (1980).

By virtue of the trial court's actions and the government's conduct, petitioner has been subjected to "embarrassment, expense and ordeal" and has been compelled "to live in a continuing state of anxiety and insecurity" as surely as if he had been subjected to a second jury trial after being acquitted on May 11, 1983. Moreover, he continues to suffer these indignities to this day, and is threatened with the most significant indignity — sentencing — on February 23rd.

Petitioner stands to suffer yet greater harm if his sentencing is not promptly stopped by this Court. The government's tenacious pursuit of this once-acquitted individual threatens to destroy his ability to do business and his wife's health. Should the trial court make good its promise to sentence petitioner on February 23rd, petitioner's ability to travel abroad, which is essential to his livelihood, may be impaired. He also may lose certain licenses which permit him to conduct his business affairs in certain foreign countries. A sentencing would also threaten his wife's fragile health. This would indeed be a severe price for him to pay, given the unusual proceedings to date, should the trial court's "reconsideration" later be found impermissible. Thus, the relief requested herein is required to prevent manifest injustice to petitioner in this most unusual situation.

HAVING ONCE ACQUITTED PETITIONER BECAUSE OF INSUFFICIENCY OF THE EVIDENCE, THE DISTRICT JUDGE MAY NOT REVERSE HIMSELF, ENGAGE IN EXTENDED RECONSIDERATION OF THE EVIDENCE, AND ENTER A JUDGMENT OF GUILTY

This case presents unusual circumstances that cannot be analyzed by simple reference to any prior decisions of this Court. Reconsideration by the trial court of a judgment of acquittal is nowhere authorized either by rule or statute.

It is clear from the record that the trial court set aside the jury's verdicts and entered judgments of acquittal with respect to petitioner because it found that the evidence was insufficient to establish an essential element of the crimes charged in the indictment. The government conceded as much in its Motion for Reconsideration, in which it argued that the courts conclusion that no single conspiracy was proved — primarily a factual issue — was in error and proceeded to offer its interpretation of the evidence to establish as much. *See* Appendix B at B-2. It is equally clear from the record that the trial judge virtually retried the case on submission of selected transcripts, and in so doing has subjected petitioner to twenty-one months of further proceedings.

Such a fact-based acquittal is protected against such reconsideration and virtual retrial by this Court's decision in *Sanabria v. United States*, 437 U.S. 54 (1978). There, the defendant was charged with violating 18 U.S.C. §1955 by virtue of his alleged participation in an illegal gambling enterprise. An element of the offense with which defendant was charged was that the business violated the law of the state in which it was conducted.The enterprise in question involved horse and numbers betting, but the indictment only charged that the enterprise was violating a section of the state law concerned with horse betting.

At the close of the government's case, the trial court ordered evidence of the numbers operations stricken because of the failure of the indictment to allege the proper section of the state law. The Court then acquitted Sanabria on the grounds that the evidence adduced at trial was insufficient to connect him to the horse betting enterprise. The government argued on appeal that the trial court's action was actually an erroneous dismissal of one of the governments theories of criminal liability — the ''numbers'' theory — which was susceptible to appellate review. Recognizing that the form of the trial court's action was contrary to such an interpretation, and mindful of

the relationship of the trial court's analysis to the single count in the indictment, this Court wrote:

> To this extent, we believe the ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. The judgment of acquittal, however erroneous, bars further prosecution of any aspect of the count and hence bars appellate review of the trial courts error.

Id. at 68-69 (footnote omitted).

Petitioner presents here a similar case, although stronger since the judgment of acquittal in the case at bar was not based on an erroneous evidentiary ruling. After careful review of the record, the trial court here determined that the evidence did not support the conclusion that an essential element of the crimes charged in the indictment — the existence of a mutually beneficial scheme constituting a single conspiracy — had been proved. *See* Appendix A at A-4. On the strength of that determination, the trial court held the evidence insufficient to convict petitioner of the crimes charged in the indictment and ordered entry of judgments of acquittal. Under *Sanabria*, the trial court's fact-based acquittal should preclude the type of procedure followed here — reconsideration followed by virtual retrial of the case by the court.

Further support for petitioner's position is found in *United States v. Scott*, *supra*, in which this Court declined to treat as dispositive for double jeopardy purposes the fact that appellate review could result in a second trial, and instead focused on whether the trial court's dismissal of the charges against the defendant there was based on insufficiency of the evidence or weight of the evidence.

> These, then, at least, are two venerable principles of double jeopardy jurisprudence. The successful appeal of a judgment of conviction, on any ground other than the in-

> sufficiency of the evidence to support the verdict . . . poses no bar to further prosecution on the same charge. *A judgment of acquittal, whether based on a jury verdict of not guilty or on a ruling by the court that the evidence is insufficient to convict, may not be appealed and terminates the prosecution when a second trial would be necessitated by a reversal.*

437 U.S. at 90-91 (emphasis added)(citations omitted).[6]

As noted by one commentator, the contrast between *Scott* and *Sanabria* offers the best justification for continued focus on the nature of the acquittal in determining whether double jeopardy is implicated by appeal or reconsidation:

> [I]f [unlike *Sanabria* or petitioner] the defendant seeks dismissal on grounds other than factual proof of guilt, there is no need to invoke the double jeopardy policies protecting the defendant against harassment and possible mistaken conviction through "improvement" of the governments case.

C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction §3919 at p. 395 (1983 Supp.). This Court has made clear that it will not allow the government an opportunity to improve its case where the grounds of an acquittal are insufficiency of the evidence.[7] Yet, the government here clearly sought to "improve" its case, by affording itself the opportunity to present to the trial court for a second time, and in a focused fashion, certain transcribed testimony after the

[6] In *Scott*, where the original dismissal was for pre-indictment delay, this Court found that because the defendant there had chosen to "seek termination of the proceedings against him on a basis unrelated to factual guilt or innocence" he would suffer no injury cognizable under the Double Jeopardy Clause if, after a successful government appeal of the dismissal, he were to be tried on the charges pending against him. 437 U.S. at 99.

[7] *See Burks v. United States*, 437 U.S. 1, 16 (1978) ("When a defendant's conviction has been overturned due to a failure of proof at trial

(continued on next page)

court had found it, on its original presentation, to be insufficient to support a conviction.

Petitioner has clearly been subjected to a "second trial" as surely as if a new jury had been empanelled immediately after the May 11, 1983 acquittal in order to give the government another chance to convict him.[8] On reconsideration, the trial court virtually re-heard portions of the pre-acquittal evidence by requesting the submission of some of that evidence in transcript form. That reconsideration took more than a year. Petitioner urges this Court to extend the protection of *Sanabria* to situations where, as here, the net result of the government's action, whether by appeal or a motion for reconsideration, is to subject a once-acquitted citizen to extended further proceedings which require resubmission, review, and reevaluation of selected evidentiary matter.

The important policy of protecting citizens from such harassment by government, which informs the Double Jeopardy Clause of the Fifth Amendment, must be zealously protected from encroachment by prosecuting authorities. Issuance of the relief requested by petitioner herein will prevent the further erosion of his Fifth Amendment rights, erosion threatened

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. . . the prosecution cannot complain of prejudice, for it has been given one fair opportunity to offer whatever proof it could assemble."); *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978) ("The ruling below is properly to be characterized as an erroneous evidentiary ruling, which led to an acquittal for insufficient evidence. That judgment of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appellate review . . . .") (footnote omitted); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) ("We must determine whether the ruling of the judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged.")

[8] Indeed, the trial court has kept petitioner under a trial bond throughout this proceeding. *See* Appendix B at B-12. This is telling evidence of the nature of the proceedings to which petitioner has been subjected.

by the trial court's announced intention to sentence petitioner on February 23rd.

CONCLUSION

For the reasons set forth above, this petition should be granted and the Writs of Mandamus and Prohibition issued.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

vs. No. 82-67-Orl-Cr-R(H)

VICTOR E. MURGO, et al.

MEMORANDUM AND ORDER

The trial of the remaining defendants, Murgo, Williams, Stephen Sarault, Aime Sarault, La Spesa, Mancini, Cally and Gerhardt, commenced on January 10, 1983 before the undersigned visiting judge sitting by designation.

In pretrial proceedings motions to sever were filed by the defendants under Rule 8(b), F.R.Cr.P. Briefs were filed and arguments conducted. On December 30, 1982, Judge Young denied the motions to sever without prejudice to their being raised at a later date. In a footnote to his order, the District Judge said:

> "The motions to sever (other than Pollack's supplemental motion based on alleged physical ailments [which motion was later granted]) are grounded on the claim that there are separate conspiracies alleged which should not be joined in one conspiracy count and in the same indictment. This Court does not have knowledge of what the evidence in the case will disclosure and, therefore, at this time cannot conclude that the evidence would support, as the Government contends, one conspiracy, or as the defendants contend, more than one conspiracy. Government counsel is privy to the anticipated evidence and proceeds at his own risk, because if defendants should be correct a mistrial could conceivably be required with a

* Filed May 11, 1983.

waste of time, effort and expense on the part of both the Government and the defendants."

The trial concluded on March 30, 1983, with the jury being unable to agree as to the guilt or innocence of the defendant, Williams, on Counts IV and V, and unable to agree as to the guilt or innocence of the defendant, Mancini, on Counts I and II. All defendants were found not guilty as to Count III.

The remaining defendants then on trial were found guilty on Counts I (the Rex Baker scheme to defraud by the use of mails) and II (the conspiracy by the use of mails to defraud Baker), except Williams as to whom a directed verdict of acquittal was granted by the Court at the conclusion of the Government's evidence. Murgo, the hub-of-the-wheel, was found guilty on Counts IV (the Temple scheme to defraud) and V (the conspiracy by the use of mails as to Temple). Sidney Gerhardt and Murgo were found guilty on Count VI, a substantive count involving 18 U.S.C. §2314. Murgo was also found guilty of Counts Seven, Eight, Nine, Ten, Eleven, Twelve, Fourteen, Fifteen, Sixteen, Seventeen, Eighteen, Nineteen, Twenty, Twenty-one, Twenty-two, Twenty-three, Twenty-four, Twenty-five and Twenty-six. Counts Thirteen and Twenty-seven through Thirty-two were dismissed on motion of the Government.

It would, of course, be nearly impossible to conduct a jury trial of over ten weeks duration without some error creeping into the trial. However, in the final analysis, the resolution of this case depends upon whether the evidence demonstrates that there were multiple conspiracies or one single overall conspiracy. This issue was left to the jury which concluded the matter adversely to the defendants. The alternative question, closely allied to the foregoing, is whether the defendants should have been severed under Rules 8(b) and 14.

The Temple-conspiracy and scheme to defraud, Counts IV and V, present no great problem as Murgo was the only

convicted defendant on these counts. However, Counts IV and V are wholly unrelated to Counts I and II as the Government concedes. That a conspiracy existed between Murgo, Beaulieu, and Solomons [now in Canada and cannot be extradicted without a showing of proof that he is probably guilty] cannot be doubted. As to Williams, since the jury did not agree as to his guilt or innocence, it can only be said by the Court that there was clearly enough evidence to go the jury on Counts IV and V. The defendant, Michele Beverelli, was not on trial and presumably has returned to his home in Italy. Without suggesting his guilt or innocence, it can only be said that, from the evidence thus far adduced as to Beverelli, his participation in any fraudulent scheme or conspiracy was so miniscule that the prosecution of him is not worth the expense involved.

As to the defendants who were tried, there is no question but that they were guilty of crimes. Murgo, Stephen Sarault, Aime Sarault, La Spesa, and Gerhartdt were all "con" men engaged in efforts to fleece prospective borrowers of substantial sums of money without any thought that they could ever fulfill and expectations of finding the sources of financing. Cally, a New York attorney, clearly participated by aiding and abetting his client, La Spesa, and thus participating in a conspiracy with La Spesa. His conduct went far beyond the reach of a normal attorney-client relationship.

But each defendant conducted his "con" efforts by his own actions, aided by a few others on each occasion. That they had a common purpose cannot be doubted, i.e., to "milk" the potential loan applicants as much as possible and holding them "on-the fence" as long as possible in hopes of receiving more money.

The most recent case on multiple versus single conspiracies is *United States v. Cole*, F.2d (11th Cir., May 2, 1985), an opinion by Chief Judge Godbold. While the convictions were affirmed because a mutually beneficial scheme was

established in that the men and women involved conducted their life style in a common or joint operaiton, a review of the notes of the undersigned in the present case (no transcript has been prepared) discloses no mutually beneficial scheme unless it is to be said that all parties who conduct fleecing operations on potential loan applicants have a mutually beneficial scheme.

No case called to my attention has gone as far as the Government now seeks to go. In all probability, *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975) (an opinion by Judge Roney), is closest in point, but even this case cannot be said to be fully applicable. It does, however, discuss Rule 8, F.R.Cr.P., and the two conspiracy counts alleged therein, each being obstruction of justice, with the Court of Appeals reversing because of failure to grant a severance.

In our case, the Government proceeded at its own risk. The Court now holds that it was in error in not concluding as a matter of law, that the proof in this case demonstrates multiple conspiracies and that motions to sever should have been granted, at least in part.

It can be argued that Murgo's convictions on the substantive counts and Gerhardt's conviction on Count VI (along with Murgo), as well as Murgo's conviction on Counts IV and V (the Temple transactions) should not be disturbed. However, the spillover effect of other evidence, especially that involving La Spesa, is bound to have had a devastating effect. *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955); *Barton v. United States*, 263 F.2d 894 (5th Cir. 1959).

I have no problem with the motion to suppress filed by Murgo. A review of the application for the search warrant and the accompanying affidavit of Agent Richardson demonstrates clear probable cause, and the fact that the search involved a thorough examination of many papers, records, documents, notes, etc., does not convert the proceeding into a "general search."

I am still concerned whether certain Murgo counts charging a violation of 18 U.S.C. §1341 may be upheld where the evidence establishes that the money was sent by wire, a violation of 18 U.S.C. §1343 which was not charged in this indictment, but the Second Circuit, in an opinion by Chief Judge Feinberg, has ruled that money sent by wire may be used to support a charge under 18 U.S.C. §1341 and, in the absence of any other authority, I feel obliged to follow the Second Circuit.

Accordingly, the case having been fully heard and verdicts of guilty returned, in accordance with Rule 29(c), the motions to set aside the guilty verdicts and enter judgments of acquittal notwithstanding the verdicts are reluctantly SUSTAINED, because the evidence now clearly shows that severances should have been granted and there is proof of multiple conspiracies. The Government may, in its judgment, perfect its appeal.

DONE and ORDERED in Chambers at Orlando, Florida, this 11th day of May, 1983.

/s/ Walter E. Hoffman
Senior United States District Judge
(Under designation)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

v. No. 82-67-Orl-Cr-R(H)

VICTOR E. MURGO, et al.

SUPPLEMENTAL MEMORANDUM

On May 11, 1983, the undersigned read from the bench in open court, and thereafter caused to be typed, his Memorandum and Order in the above case. Later that afternoon, the Clerk made inquiry as to disposition of the substantive counts (Counts 6 through 12, and Counts 14 through 26), and also made mention of Counts 4 and 5, referred to as the Temple mail fraud and conspiracy counts in which Temple counts only Murgo and Williams[1] could be affected by the Memorandum And Order dated May 11, 1983.

A review of the Memorandum And Order of May 11, 1983 clearly indicates that the offer is, at the very least, ambiguous. This is not a clerical error or an illegal sentence; it is simply an error on the part of the undersigned. Whether a correction may now be made by this Court (without raising serious jeopardy problems) is doubtful.

The Memorandum And Order dated May 11, 1983 stated:

> It can be argued that Murgo's convictions on the substantive counts and Gerhardt's conviction on Count

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*Filed May 16, 1983.

1. Prior to May 10, 1983, Williams had filed a renewed motion for judgment of acquittal as the jury had failed to agree as to his guilt or innocence and a mistrial had been declared. The undersigned judge denied Williams' renewed motion for a judgment of acquittal during a three hour argument by all counsel on all issues raised by the many motions filed.

VI (along with Murgo), as well as Murgo's conviction on Counts IV and V (the Temple transactions) should not be disturbed. However, the spillover effect of other evidence, especially that involving LaSpesa, is bound to have had a devastating effect.

The last paragraph of the Memorandum And Order reads:

> Accordingly, the case having been fully heard and verdicts of guilty returned, in accordance with Rule 29(c), the motions to set aside the guilty verdicts and enter judgments of acquittal notwithstanding the verdicts are reluctantly SUSTAINED, because the evidence now clearly shows that severances should have been granted and there is proof of multiple conspiracies. The Government may, in its judgment, perfect its appeal.

The spillover effect mentioned in the May 11, 1983 document could only affect the right of Murgo and Gerhardt to get a new trial. The Court did not make any determination of the merits of counts 4 and 5, 6 through 12, and 14 through 26, nor did the Court intend its Memorandum And Order of May 11, 1983 to infer any determination of the merits with respect to these counts. An acquittal of Murgo on these counts and Gerhardt on count 6 was *not* the intended result of the Court's action. *See United States v. Scott*, 437 U.S. 82, 96-97 (1978); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1976); *United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971).

What the Court intended to do was to grant a Rule 29(c) motion as to the defendant Steven Sarault, Aime Sarault, LaSpesa, Cally and Murgo as to Counts 1 and 2, and to grant a new trial as to Murgo on all remaining counts as to which he was convicted, and a new trial as to Gerhardt on Count 6.[2]

2. Murgo and Gerhardt each filed a Motion for New Trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Gerhardt only filed a motion for a new trial on the severence issue. Murgo filed under both Rule 29(c) and Rule 33.

The error is apparent. The Memorandum And Order can be interpreted as only concluding the case as to the two Saraults, LaSpesa, Cally and Murgo as to Counts 1 and 2, or it could be interpreted as a final acquittal of Gerhardt on Count 6 and Murgo on Counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25 and 26. The latter part of the foregoing sentence was not intended by the undersigned.

This memorandum is filed but no order is to be entered (in the absence of complete agreement between Murgo, Williams, Gerhardt, and their respective counsel, together with counsel for the Government). Assuming no further order is to be entered, the undersigned invites reversal by the appellate court as to Murgo with respect to Counts 4 through 12 and Counts 14 through 26, and as to Gerhardt with respect to Count 6.

DONE, but *not* ORDERED at Norfolk, Virginia this 13th day of May, 1983.

/s/ Walter E. Hoffman
Senior United States District Judge
(Under designation)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. No. 82-67-Orl-Cr-Y (H)

VICTOR E. MURGO, et al.

ORDER GRANTING MOTION FOR RECONSIDERATION

Upon consideration of the Government's motion for reconsideration of the memorandum and order of this Court of May 11, 1983; the Court's invitation of a response by the defendants; and the responses filed by the defendants, LaSpesa, Cally, Aime (Aimee) J. Sarault, Murgo and Gerhardt, it is

ORDERED that the motion for reconsideration be, and it hereby is, GRANTED, and the further hearing of this matter is continued for additional argument on the following issues:

(1) Did Counts 1 and 2 involve a multiple conspiracy and not a single, overall conspiracy? Stated otherwise, did LaSpesa, Cally and Uzzi formulate a separate single, overall conspiracy which was not a part of the conspiracy formulated by the remaining convicted defendants?

(2) Did the Court err in determining that Murgo was entitled to a new trial on Counts 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26, and that Gerhardt was entitled to a new trial on Count 6, because of the stated spillover effect of evidence with respect to the multiple conspiracies, if, in fact, multiple conspiracies were shown to exist under Counts 1 and 2?

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*Filed July 7, 1983.

For the purpose of clarifying its order of May 11, 1983, as already evidenced by the supplemental memorandum dated May 13, 1983, as already evidenced by the supplemental memorandum dated May 13, 1983 and filed May 16, 1983, it is

ORDERED that the stated intent of the order of May 11, 1983, was to grant a new trial to Murgo and Gerhardt on the counts named in (2) above, all as indicated by the supplemental memorandum filed with the Clerk on May 16, 1983.

It is apparent that the Court and counsel will need portions of the transcript to determine the issue raised in (1) above, as there may be differences of opinion as to the facts presented. It is, therefore

ORDERED that the Government, at its expense, shall cause to be prepared transcripts of the testimony of the following witnesses who may have furnished *independent* testimony as to the proof of a single, overall conspiracy, to-wit: (a) Rex Baker, (b) Stephen A. Sarault, (c) Christopher Uzzi, and (d) Joseph J. Beaulieu, as well as such other witnesses, if any, who the Government determines may have furnished *independent* evidence of the existence of a single, overall conspiracy. The defendants, or any of them, may supply transcripts of any witnesses who may have furnished evidence of multiple conspiracies, or such other evidence, if any, as may relate to the spillover effect of the claimed multiple conspiracy.

The attorney for the Government shall report to this Court within one week from the date of the receipt of this order as to the probable length of time required for the completion of the transcripts referred to herein to be prepared by the Government, and the Court will then arrange a schedule for briefing and final argument. The Court invites suggestions from all counsel as to a convenient date for briefing and argument, with the Government being required to file the initial brief.

Oral arguments will be heard at the United States District Court at Orlando, Florida.

A review of the authorities leads this Court to believe that one of the purposes of a timely filed motion for reconsideration is to enable the district court to correct any errors it may have made with respect to any prior order. That such a procedure is proper in a criminal case, as well as a civil case, is stated in *United States v. Healy*, 376 U.S. 75 (1984), in which the petition for rehearing was filed in the district court. The present case differs from *Healy* only in that the action of the district court in *Healy* was prior to actual trial, whereas in the present case the action of the district court is being taken after a ruling on a Rule 29(c) motion and the granting of a new trial as to Murgo and Gerhardt with respect to the counts mentioned in (2) above. See also: *Forman v. United States*, 361 U.S. 416 (1960) (pertaining to an appeal from the denial of a petition for rehearing in the Court of Appeals which had held that the trial court should have granted a motion for judgment of acquittal but later modified its order to provide for a new trial, with the Supreme Court holding that double jeopardy was not involved). The fact that the Government's document in this case is entitled "Motion for Reconsideration", rather than a "Petition for Rehearing" is of no consequence. *United States v. St. Laurent*, 521 F.2d 506 (1st Cir. 1975), *cert. denied*, 96 S.Ct. 775 (1976) (district court should have entertained a motion for reconsideration, citing *Healy*).

The Federal Rules of Criminal Procedure make no reference to a motion for reconsideration or a petition for rehearing on the district court level. However, Rule 57(b) provides:

> If no procedure is specifically prescribed by rule, the court may proceed in any lawful manner not inconsistent with these rules or with any applicable statute.

The Government, according to its motion, has not yet filed a notice of appeal from the order of May 11, 1983. Of

course, the Government proceeds at its own risk should the appellate court hold that the order of May 11, 1983 was then an apppealable order and is not extended, or is improperly extended to permit the district court to correct any error, especially after there has been a full and lengthy trial. Nevertheless, under the authorities cited to the court and independent research thereon, the Court believes that it still has the jurisdiction and authority to consider any error on the Court's part with respect to its order of May 11, 1983.

The Clerk will forward certified copies of this order to all counsel of record and to James J. Cally, appearing *pro se*.

/s/ Walter E. Hoffman
Senior United States District Judge

At Norfolk, Virginia
July 6th, 1983.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. No. 82-67-Orl.-Cr.-R(H)

VICTOR E. MURGO, et al.

ORDER DIRECTING BRIEFING SCHEDULE AND ORAL ARGUMENT

By order entered on July 6, 1983, filed July 7, 1983, the Court granted the Government's motion for reconsideration of the Court's memorandum and order dated and filed on May 11, 1983. The Court directed the Government to cause to be prepared the transcript of the testiony of four witnesses, with the right reserved to the Government and defendants to cause to be transcribed the testimony of any other witnesses deemed to be pertinent to the issues stated in the Court's order of July 6, 1983. The Government thereafter advised that the testimony of four additional witnesses would be transcribed. The defendants have not advised the Court that the testimony of any further witnesses would be needed.

On July 18, 1983, the office of the United States Attorney verbally advised the office of the undersigned, pursuant to the request contained in the order of July 6, 1983, that the contract court reporters who reported this case would require approximately one month to complete the transcriptions of the eight witnesses. Allowing for the customary miscalculations as to estimated time, the Court has deferred entering this order scheduling briefing dates and oral argument. The Court assumes that the transcripts have now been completed and presumably have been filed with the Clerk, or delivered to the office of the United States Attorney.

While the right is reserved to the defendants to file separate briefs and argue separately, it seems appropriate to suggest that counsel for Stephen Sarault, Aime Sarault, La Spesa and Cally (the latter being *pro se*) agree that one attorney prepare and argue the issue involving mulitple conspiracies versus one single overall conspiracy. As to the other issue involving Murgo and/or Gerhardt, it is assumed that counsel for these defendants may wish to file separate briefs and present separate oral arguments; however, if Murgo and Gerhardt desire to file a joint brief and/or present only one argument, this procedure is acceptable.

As to the defendant Cally, representing himself, he *must* be present at the time of oral argument. In order to keep Cally, an attorney, fully advised, counsel for the Government and any attorney for a defendant or defendants who may file a brief jointly or separately, are directed to send a copy of the brief so filed to the defendant Cally.

As to the remaining defendants, Murgo, Gerhardt, Stephen Sarault, Aime Sarault, and LaSpesa, they are invited to attend the oral argument but are not required to be present. If they elect not to attend, they will have waived any right to claim that proceedings were conducted in their absence.

Counsel are directed to share the use of the transcripts. If a statutory free copy has been filed with the Clerk, the transcripts shall be made available to the defendants or their counsel at the office of the clerk during regular business hours, but said statutory free copy shall not be removed from the office of the Clerk, without express permission of the Clerk or his Chief Deputy. Presumably, no copy will be available to the Court until after oral argument. Assuming this to be correct, counsel must quote the pertinent testimony of the witnesses in referring to same in their briefs. Likewise, the Court has no ready access to the exhibits in the case and, if an exhibit is referred to in the briefs, it is suggested that counsel quote the pertinent

portions of any exhibit in their respective briefs. Xerox copies of pages of the transcript are acceptable in lieu of quoting.

The Government will file its opening brief on or before September 23, 1983. The opening brief must contain the principal argument for the Government.

The defendants, either jointly or separately, shall file their briefs on or before October 7, 1983.

The reply brief of the Government, if any is filed, shall be filed on or before October 17, 1983. The reply brief must be confined to a response to the brief or briefs filed by the defendants, together with any legal authorities not discussed in the Government's opening brief, but discussed in the brief or briefs of the defendants.

Oral argument will be conducted at the United States Courthouse, Orlando, Florida, on Friday, October 28, 1983, at 9:30 a.m. The Government is allowed two (2) hours for argument, including any time reserved for reply. The defendants, jointly or separately, are allowed a total of two (2) hours for argument. The defendants and their counsel are directed to confer and agree as to any division of time for argument. In the event of failure of agreement, the defendants, or their counsel, shall write to the Court advising their reasons for additional time which said advice must be received by the Court at least ten (10) days in advance of oral argument, and the court will then allocate the time as between the defendants.

The Clerk will forward copies of this order to Thomas W. Turner, Managing Assistant United States Attorney, and to the following counsel for defendants:

Joseph A. Rosier, attorney for Murgo
N. James Turner, attorney for Stephen Sarault
J. William Masters, III, attorney for Aime Sarault
Elmo R. Hoffman, attorney for La Spesa
Garrick N. Fox, attorney for Gerhardt

The Clerk shall also forward, *by certified or registered mail*, a copy of this order to James Cally.

The Court does not consider that Gerald Jones, Jr., counsel for Williams, or Raymond T. Dvorak, Jr., counsel for Mancini, have any further interest in this case, but the Clerk shall nevertheless forward a copy of this order to the aforesaid two attorneys. Neither Jones nor Dvorak are required to file any brief or appear at any oral argument.

It is so ORDERED.

/s/ Walter E. Hoffman

Senior United States District Judge
(By designation)

At Norfolk, Virginia
September 1st, 1983

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

vs. No. 82-67-Orl-Cr-R(H)

VICTOR E. MURGO, et al.

MEMORANDUM

The trial of the above case before a jury commenced on Monday, January 10, 1983, and, excluding the week beginning February 28, 1983, continued until the jury returned its verdicts on Wednesday, March 30, 1983.[1]

The indictment contained 32 counts, in which the defendant, Murgo, was named in all counts. In concise terms, the various Counts in the indictment included the following:

Count I — a conspiracy charge alleging a scheme to defraud Rex Baker by the use of the mails.

Count II — a conspiracy charge alleging the use of the mails to defraud Rex Baker.

Count III — all defendants were found not guilty on this Count.

Count IV — a conspiracy charge alleging a scheme to defraud Timothy Temple by use of the mails (while several

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1. The case had been assigned to the undersigned, a visiting judge, sitting by designation for a period of five (5) weeks, or until his judicial duties had been completed. The actual trial time for this case was ten weeks and three days, same including three days and a portion of a fourth day for jury deliberation.

original defendants were named in this Count, only Murgo and Williams[2] were actually tried to the jury; the others having either previously pled guilty or not being available for trial).

Count V — a conspiracy charge alleging the use of the mails to defraud Timothy Temple.

Count VI — a substantive count against Murgo and Sidney Gerhardt involving an alleged violation of 18 U.S.C. §2314.[3]

Counts VII, VIII, IX, X, XI, XII, XIV, XV, XVI, XVII, XVIII, XVIX, XX, XXI, XXII, XXIII, XXIV, XXV, and XXVI — these were substantive counts against Victor Murgo alone, alleging violations of 18 U.S.C. §2314 and 2.

Note: Count XIII and Counts XXVII through XXXII were dismissed during trial on motion of the Government, with prejudice.

Briefly stated, the acts of the defendants, who stand convicted by the verdicts returned, namely, Murgo, Stephen

2. The jury did not reach an agreement as to the guilt or innocence of Williams on Counts IV or V, and his case was later disposed of by agreement. The Court directed a verdict for Williams on Counts I and II, and the jury found all defendants, including Williams, not guilty on Count III.

3. In its final brief, the Government agrees that Gerhardt should be accorded a new trial (probably a concession to avoid the serious question as to whether the Court should have granted a severance as to Count VI, the only count in which Gerhardt is named). The Government has further represented to the Court that, if the Court grants a new trial as to Gerhardt, the Government will then move to dismiss the charges as to him. Both Murgo and Gerhardt were found guilty on Count VI. Since Gerhardt was not named as a co-conspirator under any of the five conspiracy counts stated in the indictment, and since the case against Murgo and Gerhardt on Count VI required only three days to present, it is apparent to the Court that a severance should have been granted to Gerhardt, or otherwise Count VI should have been severed rather than require Gerhardt to sit throughout the entire trial without further mentioning his name.

Sarault, Aime Sarault, LaSpesa, and Cally were in the nature of "con" men engaged in efforts to disgorge money from prospective borrowers who were interested in obtaining substantial loans for the purpose of constructing and operating various enterprises, such as motels, housing projects, etc. The defendants unquestionably had very little hope of ever finding sources of financing. Through the medium of advance fees or specific deposits of sums of money, the defendants, either singly or in cooperation with others, caused guarantees to be issued by "paper" insurance companies, offshore banks, and the like. The defendants "milked" the potential loan applicants as much as possible by holding them in expectation of ultimately receiving the approval of their loan requests. Certainly as to Murgo, Solomons, Uzzi, Attonito, Pollack, and the two Saraults,[4] there appears to have been a clear understanding that the potential investors would be passed from one to another in order that each defendant would receive his fair share of the advance fees or specific deposits. The ultimate question resolves itself to the nexus between LaSpesa, Cally and Uzzi, on the one hand, and Murgo, Solomons, Uzzi, Attonito, Pollack, and the two Saraults, on the other hand. Stated otherwise, did the evidence disclose sufficient proof for jury consideration as to whether there existed a single overall conspiracy as to Counts I and II.[5]

Certain substantive counts involving the defendant Murgo, on which Murgo was convicted, raises a question. Murgo stood trial for violations of 18 U.S.C. §§2314 and 2, a

4. One Lawrence Mancini, an accountant ostensibly employed by the two Saraults and/or an offshore bank, was an original defendant in Counts I, II, and III. Like the others, he was found not guilty as to Count III. The jury did not agree as to his guilt or innocence on Counts I and II. At the post-trial motion hearing the Court granted his renewed motion for a directed verdict of acquittal. The Government does not contest this ruling.

5. In final argument, the Government conceded that, for the purposes of this case, Counts I and II should be jointly considered. In effect, then, we are dealing only with Count I — participation in a scheme to defraud Rex Baker by the use of the mails—plus the Temple conspiracy counts (Counts IV and V), Count VI affecting Murgo and Gerhardt, and the remaining substantive counts on which Murgo was convicted.

scheme or artifice to defraud by the use of mails, whereas the evidence with repect to certain of these counts disclosed that he caused to be transmitted by wire the signs, signals or sounds for the purpose of his executing his scheme or artifice to defraud. The question was properly raised by Murgo's counsel during the trial. The Court expressed concern as to whether a jury question was presented with respect to some of these substantive counts. A check with Lexis disclosed the then recent case of *United States v. Gilboe*, 684 F.2d 235 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1201 (1983), an opinion by Chief Judge Feinberg, where it is said (p.238):

> The question whether the section [8 U.S.C. §2314] covers electronic transfers of funds appears to be one of first impression, but we do not regard it as a difficult one. Electronic signals in this context are the means by which funds are transported. The beginning of the transaction is money in one account and the ending is money in another. The manner in which the funds were moved does not affect the ability to obtain tangible paper dollars or a bank check from the receiving account. Indeed, we suspect that actual dollars rarely move between banks, particularly in international transactions. If anything, the means of transfer were essential to the success of the fraudulent scheme. . . . The record amply shows that the direct transfers of precise amounts received through fraud were in a manner clearly indicating that the fraud and transfer were a single transaction. The primary element of this offense, transportation, "does not require proof that any specific means of transporting were used." *Pereria v. United States*, 347 U.S. 1, 9, 74 S.Ct. 358, 363, 98 L.Ed. 435 (1953). Therefore, since fraudulently obtained funds were transported within the meaning of the section [§2314] and banks in Manhattan were utilized, there was sufficient evidence to support jurisdiction under §2314.

The Counts affected by this ruling are X, XI, XV, XVI, XVII, XVIX, XX, XXI, XXII, XXIII, and XXVI, each of which made specific references to wire transfers of money, but made no references to any violation of 18 U.S.C. §1343.

Assuredly, if sentence is to be pronounced on Murgo, it would be immaterial. His scheme was a pattern of activity which must be considered in the entirety. The remaining substantive counts not involving bank wire transfers are sufficient to consider. The question to be determined is whether the Eleventh Circuit desires to follow the Second Circuit precedent ruling.

POST-TRIAL RULINGS

When the verdicts were returned, the Court allowed excess time for the filing of motions, and fixed the date for argument on all motions for May 10, 1983. Subject to the ruling on motions, the Court fixed May 11, 1983 for sentencing. On May 10, 1983, the Court heard essentially a half-day of arguments. While the Court had intimated its concern with respect to multiple conspiracies contained within Counts I, II, and III of the indictment, the arguments were not adequate.[6]

Upon reviewing its notes taken during the ten-week trial, the Court concluded that two conspiracies existed under Counts I and II of the indictment, in that Murgo, Uzzi, Antonito, Pollack, Solomons, Stephen Sarault and Aime Sarault formulated one group of co-conspirators, whereas La Spesa, Cally and Uzzi formed the other group. In the belief of

6. It is here that the Court quite obviously erred. Without the benefit of any transcript of the trial proceedings, and relying solely on several pads of notes taken during this ten-week trial, the Court, if in doubt, should have directed the preparation of at least a portion of the transcript, as it ultimately did when it granted the Government's motion for reconsideration. The difficulties in recalling specific evidence on a narrow issue involving an alleged single overall conspiracy, or a multiple conspiracy, are at best little short of impossible in such a protracted trial. The preparation of pertinent portions of the transcript have now been supplied.

the Court at that time, there was an insufficient nexus between the two groups of conspirators, although it would appear that all co-conspirators (excepting possibly Cally) were acquainted with each other.

Without directing the preparation of pertinent portions of the transcript and directing further briefing on the issue of single versus multiple conspiracies, the Court prepared its order of May 11, 1983. The Court felt that the spillover effect of all of the evidence, especially that involving LaSpesa, had a devastating effect upon Murgo and Gerhardt and, under the mistaken belief that the entire case could be handled by the appellate court (erroneously under any circumstances), set aside the guilty verdicts and entered judgments of acquittal notwithstanding the verdicts stating as its reasons "that severances should have been granted and there is proof of multiple conspiracies." It should be noted that the Court's charge to the jury had submitted, under an instruction deemed to be proper, the issue and necessity of the jury believing that a single, overall conspiracy existed, and that multiple conspiracies contained within a particular count of the indictment would not justify a finding of guilt. The Court's Memorandum and Order was filed that day, May 11, 1983.

After returning to his official station in Virginia, the Court quickly came to the conclusion that it had erred in holding that the "spillover effect" as to Murgo and Gerhardt could support a judgment notwithstanding the verdict. By a writing dated May 13, 1983, failed May 16, 1983, the court attempted to rectify its error of May 11, 1983, by preparing and filing a Supplemental Memorandum. The Court stated, in part, that "[A]n acquittal of Murgo on these Counts [Counts 4 and 5, 6 through 12, and 14 through 26] and Gerhardt on Count 6 was *not* the intended result of the Court's action," and that the Court intended, by its May 11, 1983 Memorandum and Order, to "grant a Rule 29(c) motion as to the defendants Steven Sarault, Aime Sarault, LaSpesa, Cally and Murgo as to Counts 1 and 2, and to grant a new trial as to Murgo on all

remaining Counts as to which he was convicted, and a new trial as to Gerhardt on Count 6." The Court did not, however, enter any order with respect to its Memorandum dated May 13, 1983, filed May 16, 1983, as it realized that it may have lost its jurisdiction and that a possible double jeopardy issue had been injected into the case by the Court's Memorandum and Order filed on May 11, 1983.

On June 10, 1983, the United States filed its "Motion for Reconsideration of Memorandum and Order of May 11, 1983." By letter dated June 16, 1983, the Court invited counsel for the defendants to respond, together with James Cally, a defendant who appeared *pro se*. Responses were filed by the defendants, and on July 6, 1983, filed July 7, 1983, the Court granted the Government's motion for reconsideration and directed the preparation of a transcript of the testimony of (1) Rex Baker, (2) Stephen A. Sarault, (3) Christopher Uzzi, (4) Joseph J. Beaulieu, together with that of any other witnesses who were deemed to have furnished *independent* evidence of a single, overall conspiracy. Subsequent to July 7, 1983, much delay occurred in connection with the preparation of transcripts (due largely to the fact that contract reporters were employed and changes in personnel had taken place). Further briefs were submitted by counsel for all parties, and by Mr. Cally appearing *pro se*. Finally, a final argument was conducted on February 4, 1984, at which time it was noted that other transcripts had to be provided. The Government filed, on May 4, 1984, its final Supplemental Memorandum in support of its motion for reinstatement of the jury's verdict, and the matter is ready for decision. The Government has not, as yet, filed any notice of appeal from any action by this Court.

JURISDICTION AND DOUBLE JEOPARDY

Preliminary to a resolution of the merits of the present rehearing, several threshold issues must be addressed. The undersigned had previously expressed concern with regard to the authority to entertain such a rehearing. Nevertheless, after a review of the few cases expounding on this subject, and after due consideration of the arguments raised by the government and defendants, an Order was entered on July 6, 1983, granting the Government's Motion for Reconsideration. As is their right, defendants continue to challenge the authority of this Court to retain jurisdiction after entry of a Judgment of Acquittal. Indeed, this issue was raised at the oral argument on the merits of the rehearing, conducted on February 4, 1984, and again by letter-brief subsequent to the hearing.

Defendants' persistent opposition is quite understandable in view of the relative novelty of the post-trial actions taken in this case. The Order granting the rehearing contains an admittedly cursory discussion of the complex issues presented. Cases cited by the Court at the hearing were merely intended as supplemental authority; no further analysis or clarification was given at that time. Having since received final arguments on the matter, the following discussion is offered in explanation of the reasoning applied, for the edification of the parties and whomever else may ultimately come to review the decision.

The heading to this section indicates the two separate but interrelated issues raised by the request for rehearing: jurisdiction and double jeopardy. Opposition to jurisdiction is based primarily on the absence of explicit statutory authority granting district courts the power to reconsider a prior order, and on the premise that the entry of a judgment of acquittal operates to automatically divest the district court of jurisdiction. A judgment of acquittal also, it is argued, triggers double jeopardy protection, and prohibits further reconsideration by the district court.

Supreme Court decisions, *United States v. Healy*, 376 U.S. 75 (1964) and *United States v. Dieter*, 429 U.S. 6 (1977), have conclusively resolved that district courts may entertain timely petitions for rehearing or reconsideration in criminal cases despite the absence of any statute or rule explicitly granting such authority. These opinions recognized the simple, unassailable point that "[t]he fact that appeals are now routed to the courts of appeals does not affect the wisdom of giving district courts the opportunity promptly to correct their own alleged errors, and we must likewise be wary of imposing added and unnecessary burdens on the courts of appeals." *Dieter*, 429 U.S. at 8. A number of circuits, including the Eleventh Circuit, have since applied the principles enunciated in *Healy* and *Dieter*. *See, e.g., United States v. Rothseiden*, 680 F.2d 96 (11th Cir. 1982); *United States v. Rubio*, 727 F.2d 786 (9th Cir. 1983); *United States v. Marsh*, 700 F.2d 1322 (10th Cir. 1983); *United States v. Cook*, 670 F.2d 46 (5th Cir. 1982) *cert. denied*, 456 U.S. 482 (1982); *United States v. Woodruff*, 596 F.2d 798 (8th Cir. 1979); *United States v. St. Laurent*, 521 F.2d 506 (1st Cir. 1975); *cert. denied*, 423 U.S. 1049 (1976).

Recognizing the weight of this authority, defendants assert the distinction that the above cases involved reconsideration of interlocutory orders, whereas this reconsideration and rehearing concerned a final order. This difference, defendants urge, is critical because a final order divests a district court of jurisdiction, while an interlocutory order does not. A similar argument has already been rejected by the Ninth Circuit, when it stated that "[a]lthough we are presented here with a post-trial dismissal and reinstatement of an indictment, we discern, on these facts, no basis in reason or justice for distinguishing Emens." *Rubio*, 727 F.2d at 799 (*United States v. Emens*, 565 F.2d 1142 (9th Cir. 1977), referred to in *Rubio*, involved a pre-trial dismissal of an indictment where a rehearing was held properly within the jurisdiction of the district court.).

Moreover, an examination of the cases applying *Healy* and *Dieter* reveals several situations involving what can only be characterized as final orders. For example, *United States v. Woodruff, supra*, involved a government request for rehearing of a judgment of acquittal that was entered by the trial court after the jury convicted the defendant — circumstances much like those in the present case. The Court of Appeals recognized the propriety of the motion for rehearing, and concluded that it tolled the running of the statutory period for the filing of an appeal.[7] *Woodruff*, 596 F.2d at 799; *see also Forman v. United States*, 361 U.S. 416, 425-426 (1960) (may rehear judgment of acquittal), in conjunction with *Emens*, 565 F.2d at 1145 n.6 ("*Forman* alone is not dispositive since it involved petitions for rehearing filed in the courts of appeals rather than in the district courts. *Healy*, however, extended the rule in *Forman* to the district courts."). Likewise, in *United States v. Cook, supra*, the court explicitly held that "a petition for rehearing of a district court order affecting *final judgment* . . . is undoubtedly a legitimate procedural device." 670 F.2d at 48 (emphasis added).[8] Defendant in *Cook* requested a

7. Defendants argue that *Woodruff* is inapplicable because the Eighth Circuit only considered the tolling question; defendants postulate that the reason the district court in *Woodruff* denied the motion for reconsideration was that it had no jurisdiction once it acquitted the defendant. Defendants' position ignores the inescapable premise implicit in the appellate court's assumption of jurisdiction for appeal: that the district court had jurisdiction to rehear the judgment of acquittal. Just as untimeliness bars jurisdiction in a district court, *see United States v. Robinson*, 361 U.S. 220 (1960), if the finality of a judgment of acquittal also bars jurisdiction of the district court, the Court of Appeals in *Woodruff* could not have accepted the case. A district court without jurisdiction, for whatever reason, precludes jurisdiction in an appellate court. *See Browder, infra; United States v. Martinez*, 681 F.2d 1248 (10th Cir. 1982); *Cook, supra*. Thus, in order for the court in *Woodruff* to find jurisdiction to review the merits it necessarily concluded, first, that the district court had jurisdiction to entertain a motion for rehearing after entering a judgment of acquittal, and, second, that the motion for rehearing was timely filed.

8. There appears to be some disagreement among the circuits regarding whether a request for rehearing of a denial of a new trial motion operates to toll the running of the time for appeal. Compare *Marsh, supra* (rehearing does not toll), with *Cook, supra* (rehearing does toll). That issue is not raised by the facts of this case and therefore will not be addressed.

rehearing on the denial of a motion for new trial. Certainly defendants here would not contend that a new trial motion, requested and denied after conviction, is interlocutory in nature.

Finally, in *Zimmern v. United States*, 298 U.S. 1671 (1936), the Supreme Court held that, if done within the proper time period, a district court had plenary power to correct a prior judgment order which had already been entered and was otherwise ostensibly final. In *Browder v. Director, Department of Corrections of Illinois*, 434 U.S. 257 (1978), the Supreme Court specifically found that the district court's order granting habeas corpus relief was a final order, and concluded that a timely petition for rehearing would have been effective. Although both of the foregoing cases are civil, not criminal, in nature, the decision in *Healy* rested in part on the conclusion that the practice and procedure with regard to rehearings are identical in civil and criminal cases. 376 U.S. at 78-80.

The foregoing recitation of the case law in this area reveals that the power of district courts to conduct a rehearing on a prior order is not constrained by an artificial distinction between interlocutory and final orders. The rationale underlying the Supreme Court's endorsement of the practice of allowing rehearings operates with equal vitality in either situation. Defendants' argument rests on the assumption that jurisdiction of district and appellate courts is mutually exclusive and, once a judgment is final for the purposes of an appeal, the district court loses all power to act on the case. It should be evident that this argument is one of definition. The Supreme Court has spoken unequivocally in this context: "criminal judgments are nonfinal for purposes of appeal so long as timely rehearing petitions are pending." *Healy*, 376 U.S. at 78; *Dieter*, 429 U.S. at 8; *Browder*, 434 U.S. at 268. There being no issue of timeliness in the case at hand, jurisdiction does not pose a bar to the rehearing.

The double jeopardy implications of rehearing a judgment of acquittal, however, are not so easily resolved. Exten-

sive research on the matter indicates that the precise double jeopardy issue raised by the rehearing is heretofore unencountered, and consequently has never been addressed or resolved. This lack of guidance is exacerbated by frequent changes in the Supreme Court's position on the parameters of double jeopardy.[9] Despite these problems, prevailing authority applicable to the unique posture of this case, albeit by analogy, leads to the conclusion that the double jeopardy clause is not violated by the rehearing.

A judgment of acquittal has long enjoyed special status under the double jeopardy clause. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States v. DiFrancesco*, 449 U.S. 117 (1980). Before the analysis can proceed the exact nature of and basis for the judgment of acquittal entered *sub judice* must be identified. This task is critical as different law may apply depending on whether an acquittal is entered due to legal error, or an evaluation of the evidence. *See Burk's v. United States*, 437 U.S. 1 (1978). The latter category of cases is further divided into judgments of acquittal that are based on the weight of the evidence, or on the sufficiency of the evidence. *See Tibbs v. Florida*, 457 U.S. 31 (1982). Unfortunately, many cases are not amendable to clear distinctions between law and fact, and between weight and sufficiency of the evidence. This is such a case.

The Order granting the judgment of acquittal so held "because the evidence now clearly shows that severances should have been granted and there is proof of multiple conspiracies" Memorandum and Order, May 11, 1983, at 8. The language referring to severances indicates legal error, that there was a wrongful and prejudicial joinder of charges and defendants. Reference to multiple conspiracies, however, in-

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9. *See, e.g., Burks v. United States*, 437 U.S. 1 (1978) (overruling *Bryan v. United States*, 338 U.S. 552 (1950)); *Sapir v. United States*, 348 U.S. 373 (1955), and *Forman v. United States*, 361 U.S. 416 (1960); *United States v. Scott*, 437 U.S. 82 (1978) (overruling *United States v. Jenkins*, 420 U.S. 358 (1975)).

dicates a variance between the facts adduced at trial and the indictment charging a single conspiracy. These two points are not inconsistent. Necessarily, the prejudicial joinder arises out of and is secondary to the conclusion that there were multiple conspiracies as opposed to a single conspiracy. Thus, the judgment of acquittal was based on a perceived variance between the indictment and the proof adduced at trial. Even though the government insists that the acquittal was precipitated by the Court's erroneous understanding of the legal doctrine of mutually beneficial schemes, the stated basis for the judgment of acquittal must surely be characterized as insufficiency of the evidence. *United States v. Plotke*, 725 F.2d 1303, 1308 (11th Cir. 1984); *see also Sanabria v. United States*, 437 U.S. 54 (1977).

Having identified that the judgment of acquittal was entered due to insufficiency of the evidence, the remaining question is whether such a conclusion may be reconsidered. The Supreme Court has issued two apparently contradictory dictates that control the outcome of this inquiry. In *United States v. Martin Linen Supply Co.*, *supra*, the Court stated: "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" 430 U.S. at 57 (citation omitted).

In contrast to this seemingly all encompassing prohibition against review of judgments of acquittal, the Court held in *United States v. Wilson*, 420 U.S. 332 (1975), that "when a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause." 420 U.S. at 382-383. According to *Wilson*, the touchstone for a violation of the Double Jeopardy Clause is whether a retrial would be necessitated by reversal. *See DiFrancesco*, 449 U.S. at 132 ("[T]he prohibition against multiple trials is the 'controlling constitutional principle'.");

see also Tibbs, 457 U.S. at 41; *United States v. Scott*, 437 U.S. 82, 89-92 (1978).

This latter line of cases appears dispositive of the issue at hand. Reconsideration of a judgment of acquittal, by itself, does not violate double jeopardy where, as is the case here, reversal would be satisfied by a reinstatement of the original jury verdict. *See Scott*, 437 U.S. at 91 n.7 ("In *Jenkins* we had assumed that a judgment of acquittal could be appealed where no retrial would be needed on remand . . . Despite the Court's heavy emphasis on the finality of an acquittal in *Martin Linen* and *Sanabria v. United States, ante*, p. 54, neither decision explicitly repudiates this assumption.") Although the Supreme Court has never definitively spoken, a majority of the circuits agree with this proposition.[10]

The final argument available to defendants is that there is a difference between when an appellate court reviews a judgment of acquittal and when a trial judge reconsiders the same. Insofar as in both instances a reversal would merely result in a reinstatement of the jury verdict, there is no manifest different cognizable under the Double Joepardy Clause that would dictate separate treatment.[11] Consequently, this rehearing raises no double jeopardy problem, and this Court properly retains jurisdiction over the matter.

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10. *See, e.g., United States v. Burns*, 597 F.2d 939, 940 (5th Cir. 1979); *United States v. Singleton*, 702 F.2d 1159, 1161 (D.C. Cir. 1983); *United States v. Steed*, 674 F.2d 284, 286 (4th Cir. 1982) (*en banc*) *cert. denied*, 459 U.S. 829 (1982); *United States v. Uzzolino*, 651 F.2d 207, 212 n.6 (3rd Cir. 1981) *cert. denied*, 454 U.S. 865 (1981); *United States v. Blasco*, 581 F.2d 681, 683 (7th Cir.) *cert. denied*, 439 U.S. 966 (1978); *United States v. Jones*, 580 F.2d 219, 221-222 n.3 (6th Cir. 1978); *United States v. Calloway*, 562 F.2d 615, 616-617 (10th Cir. 1977); *United States v. Rojas*, 554 F.2d 938, 941 (9th Cir. 1977); *United States v. DeGarces*, 518 F.2d 1156, 1159 (2nd Cir. 1975); *but see* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3919 (after and analysis of Supreme Court cases, concludes that it is doubtful whether the government may appeal a judgment of acquittal).

11. The result would likely be different where a trial court sitting as a fact finder at a bench trial is asked to reconsider the entry of a judgment of acquittal. *See Martin Linen Supply Co.*, 430 U.S. at 573 n.12. In that case, unlike here, there would be no prior verdict to reinstate upon reversal.

MERITS OF RECONSIDERATION

In *United States v. Kotteakęs*, 328 U.S. 750 (1946), the Supreme Court held that where the evidence adduced at trial show multiple conspiracies, while the indictment alleges a single conspiracy, if the defendant can establish that substantial rights were prejudiced as a result of said variance, defendants' conviction must be reversed. *See United States v. Brito*, 721 F.2d 743, 746-745 (11th Cir. 1983); *United States v. Sutherland*, 656 F.2d 1181, 1190 n.6 (5th Cir. 1981) (Unit A), *cert. denied*, 455 U.S. 949 (1982). The Eleventh Circuit has made it abundantly clear that whether one or more conspiracies exist is a question of fact for the jury to decide. *United States v. Carter*, 721 F.2d 1514, 1531 (11th Cir. 1984); *United States v. Lee*, 695 F.2d 515, 518 (11th Cir. 1983), *cert. denied*, ____U.S.____, 104 S.Ct. 130 (1983). This rule holds true especially where the jury was properly instructed, as here[12], that

12. The jury was instructed as follows with regard to finding a single as opposed to multiple conspiracy:

> Before getting into the details of the counts in the indictment remaining for your consideration, I must point out to you that, with respect to the two conspiracy counts (Counts 2 and 5), while all defendants by their pleas of not guilty have denied that any conspiracy existed and, even if a conspiracy existed, have further denied that they were a party to such conspiracy, yet with regard to these alleged conspiracy counts I must tell you that proof of several separate conspiracies within one count of the indictment is not proof of the single, overall conspiracy charged in that particular count of the indictment.
>
> What you must determine is whether the single conspiracy existed between two or more of the conspirators. Of course, if you find that no such single, overall conspiracy existed, then you must find all defendants not guilty as to that particular conspiracy charge. However, if you are satisfied beyond a reasonable doubt that a single, overall conspiracy existed, you must then determine who were members of that conspiracy.
>
> If you find that a particular defendant was a member of another conspiracy—not the conspiracy charged in the indictment—then you must acquit that defendant. In other words, to find a defendant guilty under a count charging a conspiracy, you must find that he was a member of the conspiracy charged in the indictment and not some other, separate conspiracy.
>
> The principal factors you may consider in determining whether a single, overall conspiracy existed or whether there were multiple con-

they must find the single conspiracy charged, and not multiple conspiracies, in order to convict. *See Plotke*, 725 F.2d at 1308. Nevertheless, this rule does not allow courts to abdicate their primary responsibility of insuring that there is sufficient factual support of a single conspiracy prerequisite to submission of the issue to the jury.

Prior to entering the Judgments of Acquittal, this Court concluded that such a prejudicial variance had occurred. As was indicated in the section entitled "Post-Trial Rulings," the specific grounds on which the undersigned found two conspiracies instead of the single conspiracy charged in the indictment was the belief that the government failed to show a sufficient nexus between the two apparent groups of co-conspirators: on the one hand, Murgo, Uzzi, Antonito, Pollack, Solomons, and the Saraults; on the other hand, LaSpesa, Cally and Uzzi.

This finding is the sole question to be reviewed in the present reconsideration. Evidence of a nexus will be viewed in a light most favorable to the government, with all reasonable inferences drawn in its favor. *Plotke*, 725 F.2d at 1308, citing *Glasser v. United States*, 315 U.S. 60, 80 (1942). *See also*, *United States v. Lee*, 695 F.2d at 517.

The government argues that the two ostensibly separate groups in this case may be bound into a a single conspiracy because a "mutually beneficial scheme" has been shown. *See United States v. Cole*, 704 F.2d 554, 557(11th Cir. 1983). Where otherwise seemingly independent conspirators need

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spiracies disclosed by the evidence as within the alleged single, overall conspiracy, include the existence of a common goal, the nature of any scheme, and the overlapping, if any, of participants in the various dealings alleged in the conspiracy counts.

The fact that two separate conspiracies are separately charged in Counts 2 and 5 of the indictment is permissible. One of the questions you must determine is whether there was a single, overall conspiracy in each particular conspiracy count, or whether there were multiple conspiracies within either of these counts.

one another for the continued prosperity and survival of their own particular enterprise, this need, in effect, envelopes these groups in a single, continuous scheme that relies upon and contemplates their interdependent parts.

Much of the post-trial debate has focused on whether the doctrine of mutually beneficial schemes applies to the facts of this case, or whether the facts constitute a "wheel," "rim," "hub," or "chain" conspiracy. This focus on the different subcategories recognized in the law of conspiracy is, however, misleading and artificially constraining. "Conspiracies are as complex as the versatility of human nature and federal protection against them is not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical molecular or atomic forms." *United States v. Perez*, 489 F.2d 51, 59 n.11 (5th Cir. 1973); *see also United States v. Elam*, 678 F.2d 1234, 1246 (5th Cir. 1982).

The essence of a single conspiracy, simply put, is an overall scheme or objective for which purpose individual members have agreed to participate—their particular role or function is of no consequence as long as the shared objective and the agreed upon blueprint for achieving that objective is the binding force. "The principal factors involved in determining whether there has been a prejudicial variance between an allegation of a single conspiracy and proof at trial of multiple conspiracy are the 'existence of a common goal, the nature of the scheme and an overlapping of participants in various dealings.' " *Lee*, *supra*, 695 F.2d at 518 (citation omitted); *Plotke*, *supra*, 725 F.2d at 1308. *"The agreement constitutes a single conspiracy if the agreement contemplates bringing to pass a continuous result that will not continue without the continous cooperation of the conspirators to keep it up."* *United States v. Hess*, 691 F.2d 984, 988 (11th Cir. 1982), citing, *United States v. Solomon*, 686 F.2d 863, 871 (11th Cir. 1982).

Applying the preceding formula to the facts of this case as now revealed by the transcript, there is little question but that the jury was provided with sufficient evidence from which to find a single conspiracy. The overall objective was plainly to make money; the plan devised and implemented to make money was an advance fee scheme; there was a definite overlap between the participants (evidenced by the relationships between Murgo and LaSpesa, Murgo and the Saraults, the Saraults and LaSpesa, and Uzzi, Murgo and LaSpesa); finally, each needed the other for the continued success of the scheme, to pass on victims and to forestall their suspicions and fears, meanwhile exacting a price at each successive level. *See generally, Hess, supra.*

Indeed, defendants' scheme, as ingenious as it is deceptive, is no less a single conspiracy for its subtlety and many freeflowing parts. A similarly complicated scheme was described as follows by the Fifth Circuit in a fashion strikingly reminiscent of the facts in this case:

> [t]he teaching of the cases as applied to the present one, is that the defrauding of different people over an extended period of time, using different means and representations, may constitute but one scheme. Naturally, by clear analogy it does not make any difference that the various deceptions were practiced at different places. Nor is it significant that the whole scheme was not planned out in advance. A continuing "intention to devise it," . . . or an imperfectly conceived plan to defraud which becomes more and more sophisticated and grandiose as the plan progresses and the assets of the more gullible victims are exhausted, may well constitute a single scheme.

Owens v. United States, 221 F.2d 351, 354 (5th Cir. 1955), quoted in *United States v. Mastelotto*, 717 F.2d 1238, 1245 (9th Cir. 1983).

An advanced fee scheme relies for its successful perpetuation on an infusion of new potential sources of funding to

whom increasingly disgruntled prospective borrowers may be sent. Defrauded clients are moved along quickly — but not before they have paid that additional fee to "finally obtain results" — so that the developing pattern of prior disappointments is less evident as the prospective borrower is urged to look forward with renewed hope. "The very nature of this conspiracy required personnel changes in order for it to continue." *Plotke*, 725 F.2d at 1308. Necessarily, each "new source" is in on the fraudulent scheme, for a legitimate enterprise poses the risk of recognizing the scam and might alert the prospective borrower.

Thus, the group headed by LaSpesa was an integral segment of and valuable to the overall conspiracy in large part because of its appearance of separateness. This fresh appearance made him attractive to clients as an untapped source of funding, and it was this very same appearance that initially led this Court to the conclusion that two conspiracies were established. Only with the benefit of a transcript can this illusion be pierced and the nexus between the LaSpesa group and the original Murgo group definitively identified.

Counts One and Two of the indictment focus on the scheme to defraud Rex Baker. Consequently, Baker was in a unique position to testify with regard to the relationship between these two groups. LaSpesa's role appears to have changed somewhat during the pendency of the scheme, but the character of his position remained as the same reassuring source of funds.

On or about August 29, 1980, just after Baker had received the unsigned letter of commitment from Merchants' Bank of Commerce (Anguilla), Limited, Baker went to Margo's office and told Murgo that financial information about Merchants' Bank must be supplied if the guarantee was to be recognized. [Tr. February 15, 1983, at 160]. In response to this concern, Murgo called LaSpesa, with Baker present and following the discussion on a speaker phone, and received

authorization from LaSpesa to release to Baker a financial statement of Merchants' Bank [Tr. February 15, 1983, at 160]. It was Baker's understanding that LaSpesa was a major stockholder in and the President of Merchants' Bank. Baker was promptly handed a copy of the financial sheet of the bank, with a cover letter attached on the stationery of Murgo & Sanborn Associates stating that the financial statement was being supplied for use in conjunction with the letter of commitment. See Government's Exhibit 550. [Tr. February 15, 1983, at 160-162]. The cover letter indicated a copy was sent to LaSpesa at Cally's New York law office [Tr. February 15, 1983, at 162]. Significantly, Murgo assured Baker at the time that it looked like a good financial statement to back up the guarantee. [Tr. February 16, 1983, at 6].

Predictably, the banks at which Baker presented the letter of commitment and financial statement nevertheless rejected his request for a loan. Baker then called Stephen Sarault, on or about September 2, 1980, advising him of this lack of success. [Tr. February 16, 1980, at 7]. Sarault expressed surprise and dismay that Baker had obtained the financial statement of Merchants' Bank, despite the fact that LaSpesa has authorized its release, and he cancelled the letter of commitment effective immediately — which was easily accomplished since the letter was unsigned anyway. [Tr. February 16, 1980, at 7-8].

Baker contacted Uzzi soon thereafter and set up a meeting with LaSpesa in New York to be held on October 8, 1980, to discuss the cancellation of the commitment; LaSpesa, however, was unavailable, and Baker returned home without having seen LaSpesa. [Tr. February 16, 1980, 8-11]. Meanwhile, Uzzi assured Baker that LaSpesa had the final word on the commitment, and, after the meeting with LaSpesa fell through, Uzzi represented to Baker that LaSpesa would provide the guarantee for a one point commitment fee. [Tr. February 16, 1980, at 9, 11-12].

Baker again went to New York, on October 22, 1980, this time accompanied by two other prospective borrowers, Diem and Gilmore, and Diem's attorney O'Hare, to meet with LaSpesa and Uzzi at Cally's law office. Present at this meeting were Baker, Diem, Gilmore, O'Hare, LaSpesa, Cally, and Uzzi-[Tr. February 16, 1983, at 14-15]. LaSpesa indicated that for a one percent commitment fee he would come up with a guarantee and assist with procuring the funding. [Tr. February 16, 1983, at 15-16]. Diem and Gilmore turned over the one percent required for their project, but Baker did not have the money to do likewise. [Tr. February 16, 1983, at 17-18]. LaSpesa assured Baker that he would do the same for Baker as he did for Diem and Gilmore, albeit once the fee was paid. [Tr. February 17, 1983, at 73-74].

Baker also testified about receiving two letters, both highly probative of the connection between the Murgo group and the LaSpesa group. The first letter, dated October 16, 1980, from Murgo & Sanborn Associates (Canada), states in pertinent part: "We are pleased to report to you that the principal shareholder in the Bank has authorized us to inform you that he will positively assist in the funding of the Letter of Credit." See Government's Exhibit 551; [Tr. February 16, 1983, at 20]. As was stated earlier, Murgo told Baker that LaSpesa was the principal shareholder of Merchant's Bank [Tr. February 15, 1983 at 160; Tr. February 16, 1983, at 21]. The second letter, dated December 8, 1980, also sent to Baker from Murgo & Sanborn Associates (Canada), reads:

> Dear Sir, In view of the fact that we have had some difficulty in funding the commitment from the Merchants Bank of Commerce of Anguilla, and LTD [sic], Mr. Joseph LaSpesa, principal shareholder, has purchased another bank. We have been advised that this bank has prime bank correspondence [sic] who are internationally accepted by funding entities.

> Mr. LaSpesa has informed us that he will do everything possible to assist our clients right after the new year . . .

[Tr. February 16, 1983, at 24-25]. Both of these letters were signed by Solomons, President of the Canada branch of Murgo and Sanborn Associates.

In addition to the foregoing letters, Uzzi, the only participant in this complicated scheme who operated on the inside with both Murgo and LaSpesa, confirmed the essentials of what Baker attested to with regard to LaSpesa's link with Murgo. Uzzi testified that he and Murgo discussed the problems prospective borrowers were having obtaining loans because of the weak guarantees they were provided. [Tr. February 17, 1983, at 156]. During that discussion Murgo expressed confidence that things would change now that LaSpesa had acquired Merchants' Bank. [Tr. February 17, 1983, at 156, 159]. Murgo was clearly well-informed about LaSpesa's dealings. Subsequent to this discussion, Uzzi came to meet with LaSpesa several times. On one occasion, in September of 1980, in Cally's office LaSpesa assured Uzzi that he would honor Saraults' letters of intent, including that issued to Baker. [Tr. February 17, 1983, at 172; Tr. February 18, 1983, at 68]. In specific reference to Baker, LaSpesa indicated to Uzzi that Baker would get a letter of credit if he paid the one percent fee. [Tr. February 17, 1983, at 197; February 18, 1983, at 84]. Uzzi remained in close contact with Murgo throughout in regard to their respective dealings with Merchants Bank, and it was Murgo who told Uzzi that LaSpesa was in the process of acquiring another bank sometime in late 1980. [Tr. February 17, 1983, at 226-227].

The basics related to by Baker and Uzzi were corroborated by a few other witnesses, and no significant impeachment was effected by defense counsel. Of course, some of the more self-serving statements made by Uzzi must be viewed in light of his complicity in the scheme. Taken as a whole, a sim-

ple scenario may be drawn as the clearly evident pattern of deception presents itself. At the first level, Murgo and Solomons each took their piece of the pie from Baker. Baker's substantial initial investment effectively hooked him for further taking. On the second level, Uzzi, Antonito, and Pollack received their cut from Baker for a letter of intent, to be issued in conjunction with one drawn by Sarault's Merchants' Bank. Baker balked when Sarault requested an additional fee, especially when he was informed that Sarault had already received a share of the money he previously paid. The unsigned letter of commitment issued by Merchants' Bank was a carrot, designed to induce further cooperation and to give the appearance of action and results. Of course, as intended from the beginning, nothing came of the letter of commitment and it was cancelled. Then, on the third level, comes LaSpesa. He too wants a cut, but the stakes become significantly higher. Baker is encouraged, however, by Murgo and Uzzi constantly raising false hopes to assure Baker that he was getting something for his money. That is why Murgo needed LaSpesa. LaSpesa, on his part, recognized a perfect set-up and readily joined in to get his piece of those made ripe for the picking by Murgo and his confederates. Also, his financial credibility was dependent upon and established by Murgo. LaSpesa needed Murgo for ready made clients; clients who would not probe too deeply into his financial background.

On each successive level: money is taken up front; the illusion of results is created; the deal falls through; the prospective borrower is sent to the next level. Ultimate success depends on a continual flow of new levels. Thus, while LaSpesa is admittedly a newcomer on the already commenced scheme, his role, though not his identity, was contemplated from its inception. Likewise, the fact that prior participants such as the Saraults would fade into the background was also contemplated by the overall scheme. Therefore, neither the Saraults' departure, nor LaSpesa's joinder had the effect of breaking up

the old conspiracy or creating a new one.[13] The scam continues until the prospective borrower gives up, wises up, or is financially drained and thus unattractive for further purposes. Similar to most sophisticated financial schemes to defraud, expansion and the changing of actors was an integral part of its nature. *See Plotke supra; Perez, supra.* "It would be a 'perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one.' " *Perez*, 489 F.2d at 63, quoting *United States v. Palermo*, 410 F.2d 468, 470 (7th Cir. 1969). The nexus between the Murgo group and the LaSpesa group is now manifest.

Accordingly, this Court concludes that its original entry of the Judgement of Acquittal was in error. The evidence previously recited in this memorandum, when viewed in a light most favorable to the government, surely provides sufficient evidence from which the jury could find a single conspiracy in which all of the defendants on trial under Count I participated. Since the issues of improper joinder and prejudicial spillover effect hinged entirely upon a finding of multiple conspiracies (with the exception of Gerhardt, discussed in footnote 3, *supra*), they need not be further addressed.

Upon presentation of an appropriate order, the judgemnts of acquittal will be VACATED; all of the jury verdicts will be

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13. Defendants cite *United States v. Camiel*, 689 F.2d 31 (3rd Cir. 1982), in support of the proposition that the apparent disagreement between the Saraults and LaSpesa precludes a finding of a single conspiracy. The defendants in *Camiel*, however, were always at odds, and at no time worked together under a single scheme. In contrast, here, LaSpesa and the Saraults initially worked intimately together. Furthermore, the scheme in this instance, unlike that in *Camiel*, contemplated that the Saraults would leave the forefront, and someone else would take their place as the primary source of the guarantee. That someone else turned out to be LaSpesa. Because the conspiracy involved a change in the participants, the Saraults cannot contend that they withdrew from the conspiracy or that the original conspiracy was terminated.

REINSTATED; and the judgments of guilty ENTERED. A new trial will be GRANTED as to Gerhardt, with the understanding that the government will dismiss the charges as to him.

/s/ Walter E. Hoffman

Senior United States District Judge
(Under designation)

At Norfolk, Virginia
August 20, 1984

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA	:	
	:	CASE NO.
v.	:	
	:	82-67-ORL-CR-R (WEH)
	:	
VICTOR E. MURGO, et al.	:	

ORDER

The various applications or petitions for a writ of mandamus and/or prohibition filed by Victor E. Murgo, Joseph S. LaSpesa, Stephen A. Sarault, Aime Sarault, and James J. Cally, having now been considered and denied by the United States Court of Appeals for the Eleventh Circuit, and no stay order having been entered, and

The petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit having been filed with the Supreme Court of the United States in a case entitled "*James J. Cally v. Walter E. Hoffman, United States District Judge,*" and is now pending but no stay order having been entered, the Court is of the opinion that it should now proceed to sentence said defendants, after the entry of an appropriate order to be entered with respect to this Court's Memorandum dated August 20, 1984.

It is, therefore, ORDERED:

(1) That the Probation Department of this Court do forthwith update its previously prepared presentence reports, including any recommendation if any was made, and upon completion of any revisions counsel for each defendant named above, as well as James J. Cally appearing *pro se*, shall be advised by the Probation Department that the revised presentence report is available for inspection by that particular

defendant and, if represented, by his counsel. The Court has not yet examined the previously filed presentence reports due to the then pendency of post-trial motions which resulted in the order of May 11, 1983.

(2) That the Assistant United States Attorney, Stephen J. Calvacca, or someone for him, do forthwith prepare a draft order for consideration by the Court and counsel as to the Court's Memorandum dated August 20, 1984, and shall forward said draft order to counsel named herein and James J. Cally, to the end that it may be received by counsel and James J. Cally on or before January 23, 1985.

(3) That said proposed draft order, as revised if any revisions be necessary, be presented in open court on Monday, January 28, 1985, at 9:30 o'clock, a.m., at the United States Courthouse, 80 North Hughey Avenue, Orlando, Florida, by the Assistant United States Attorney, or someone for him. The actual presence of the defendants and/or their counsel is not required on January 28, 1985, but it is the intention of the Court to enter and order on that date. The Court will automatically enter an objection and exception to the entry of said order in behalf of each of the defendants heretofore named.

Said order shall provide a date for sentencing said defendants, and their counsel, if any, shall appear at the selected date for sentencing, at the hour specified therein. Since the undersigned judge has been assigned to hold court in the Middle District of Florida, Orlando Division, beginning Monday, January 28, 1985, and ending at the close of business on Friday, March 1, 1985, the selection of a convenient date should be correlated with such other cases which may have already been assigned for trial, but the Court is willing to convene for the purpose of conducting the sentencing hearing on any weekday, except Fridays, at 5:00 o'clock p.m., or on any Saturday while the undersigned judge is holding court in Orlando. The Saturday date is mentioned as it obviously will avoid conflicts

of counsel. It is suggested that the Assistant United States Attorney confer with the law clerk for former Judge John A. Reed, Jr., who will remain on duty through January 30, 1985. Counsel for all defendants and James J. Cally shall advise the Assistant United States Attorney, upon receipt of this order, as to any dates which must be avoided in scheduling the sentencing hearing.

(4) The Clerk will forward certified copies of this order and the accompanying letter to all counsel noted below and to James J. Cally, assuming that the addresses shown herein are the same as of record with the Clerk. If there are conflicting addresses, the Clerk shall forward said copies to both addresses.

/s/ Walter E. Hoffman
Senior United States District Judge

At Norfolk, Virginia
January 3, 1985

Copies to be sent to:

Stephen J. Calvacca, Esq.
Assistant United States Attorney
Federal Office & U.S. Courthouse
80 N. Hughey Avenue
Orlando, Florida 32801

U.S. Probation Department
Federal Office & U.S. Courthouse
80 N. Hughey Avenue
Orlando, Florida 32801

Jake Arbes, Esq.
Attorney at Law
Suite 1000, Peachtree Center Tower
230 Peachtree Street, N. W.
Atlanta, Georgia 30303

Joseph Rosier, Esq.
Attorney at Law
Post Office Box 1455
Longwood, Florida 32750

Allen Melton, Esq.
Attorney at Law
1309 Main Street
Suite 907
Dallas, Texas 75202

I certify the foregoing to be a true and correct copy of the original.

DONALD M. CINNAMOND, Clerk
United States District Court
Middle District of Florida

By: /s/ Sandy Zimmerman
Deputy Clerk

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

vs. No. 82-67-Orl-Cr-R(WEH)

VICTOR E. MURGO, et al.

ORDER

This Court, having granted the Government's petition for a rehearing on July 6, 1983, and upon such rehearing after all parties were heard in the matter, this Court, in a memorandum opinion dated August 20, 1984, (1) REVERSED its earlier rulings of May 11 and 13, 1983, which had granted post-verdict judgments of acquittal and orders for a new trial, (2) VACATED such judgments of acquittal and orders for a new trial and (3) REINSTATED the jury's verdicts of guilty (except as to defendant Gerhardt) as returned in open court on March 30, 1983; it is now ORDERED that said judgments of acquittal and orders for a new trial ARE HEREBY VACATED and that said jury's verdicts of guilty ARE HEREBY REINSTATED, with the exception of the jury's verdict of guilty under Count VI of the indictment as to defendant Gerhardt as to whom an order for a new trial is hereby GRANTED.

The reasons for the above orders vacating the judgments of acquittal and orders for a new trial and reinstating the jury's verdicts of guilty are set forth in this Court's memorandum opinion of August 20, 1984, which by such reference is deemed incorporated herein and made a part hereof.

DONE and ORDERED this 28th day of January, 1985, at Orlando, Florida.

/s/ Walter E. Hoffman

Walter E. Hoffman
Senior United States District Judge

* Filed Jan 28, 1985.

United States District Court

FOR THE

MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. No. 82-67 Orl-Cr-R (WEH)

VICTOR E. MURGO, et al.

NOTICE OF SENTENCING

TAKE NOTICE that the above-entitled case has been set for Sentencing at 9:30 AM, on Saturday, February 23rd, 1985, at United States Courthouse & Federal Building, 80 North Hughey Avenue, Orlando, Florida, before the Honorable Walter E. Hoffman, Senior United States District Judge, in Courtroom #2.

Date January 28th, 1985 DONALD M. CINNAMOND

Clerk.

BY Louis Pirone

Deputy Clerk.

DEFENDANT(S) MUST BE PRESENT

To Stephen J. Calvacca, Esquire
Assistant United States Attorney
501 Federal Building
80 North Hughey Avenue
Orlando, FL 32801

United States Marshal
530 Federal Building
80 North Hughey Avenue
Orlando, FL 32801

US Probation Officer
310 Federal Building
80 North Hughey Avenue
Orlando, FL 32801

J. William Masters, Esquire
1500 South Samoran Boulevard
Orlando, FL 32807

Joseph A. Rosier, Esquire
Post Office Box 1445
Longwood, FL 32750

Accredited Surety & Casualty
c/o Allied Bonding Agency
27 Wall Street
Orlando, FL 32801

Jake Arbes,. Esquire
230 Peachtree Street N.W.
Suite 1000
Atlanta, GA 30303

N. James Turner, Esquire
Post Office Box 3221
Orlando, FL 32802

Elmo R. Hoffman, Esquire
Post Office Box 2867
Orlando, FL 32802

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. No. 83-69-Cr-Orl-11

VICTOR E. MURGO

ORDER FOR DISMISSAL

Pursuant to Rule 48(a) of the Federal Rules of Criminal Procedure and by leave of court endorsed hereon the United States Attorney for the Middle District of Florida hereby dismisses the indictment against Victor E. Murgo defendant upon instructions from Acting Assistant Attorney General, John C. Keeney, declining to give discretionary authorization to proceed on successive prosecution of the above defendant.

Copies to:

U.S. Attorney (TWT)

U.S. Marshal

Federal Bureau of Investigation
80 North Hughey Avenue, Rm. 541
Orlando, Florida 32801

Joseph A. Rosier, Esquire
Post Office Box 1445
Longwood, Florida 32750

ROBERT W. MERKLE
United States Attorney

By /s/ Illegible

Assistant United States Attorney
501 Federal Bldg., 80 N. Hughey
Orlando, FL 32801
305/420-6341

Leave of court is granted for the filing of the foregoing dismissal

/s/ Illegible

United States District Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. No. 82-67-Orl-Cr-Y (H)

VICTOR E. MURGO, et al.

MOTION FOR RECONSIDERATION OF MEMORANDUM AND ORDER OF MAY 11, 1983

The United States of America, by and through its undersigned attorney, hereby moves the Court for reconsideration of its May 11, 1983 Memorandum and Order. The Government's motion for Reconsideration is timely filed within the thirty day period for appeal. The Government will have thirty days to appeal if the Court denies the instant Motion for Reconsideration. *See United States v. Healy*, 376 U.S. 75, 77-79 (1964); *United States v. St. Laurent*, 521 F.2d 506, 511-12 (1st Cir. 1975), *cet. denied* 423 U.S. 1049 (1975). In support of this motion, the undersigned respectfully submits:

(1) The Court is in error in concluding that there was "no mutually beneficial scheme" in this case. *See* Memorandum and Order at page 6. The defendants in this case maintained greater interdependence than did the defendants in *United States v. Cole*, __ F.2d __ (May 2, 1983, 11th Cir.) (No. 82-5225) or *United States v. Perez*, 489 F.2d 51 (5th Cir. 1973) (the authoritative decision on this point was evidently overlooked by the Court in its Memorandum Opinion and Order; fraudulent insurance claim scheme involving 21 defendants with only a core group of organizers paricipating in more than one accident). Murgo and his cohorts in Orlando needed the Merchants Bank of Commerce, as did the Saraults, Cally and La Spesa. They all bolstered the Merchants Bank of Com-

merce to make it appear legitimate in order to "approve" or to secure the "approval" of loans for common victims. The Merchants Bank, along with Cally's law office, afforded La Spesa institutional legitimacy. The bank was Cally's vehicle for claiming to be the megabillionaire that could make any loan for any investor. Murgo and his people similarly utilized the bank. The Merchants Bank was going to be the savior for Rex Baker and many other investors. This is why investors, who were victimized by the defendants ended up passing through the same chain from Murgo to Uzzi and Attonito to Sarault to the Merchants Bank to La Spesa. There can be no doubt that there was a mutually beneficial scheme in this case. Each defendant needed the other and each defendant needed the Merchants Bank. The bank functioned as a common thread unifying the conspirators. Multiple participants is the *sine qua non* of an advanced fee scheme. The participants knew or should have known of the existence of other members and the highly probable inclusion of additional members. *See generally United States v. Watson*, 669 F.2d 1374, 1380 (11th Cir. 1982) (use of common airport making it inconceivable participants were unaware of conspiracy to import and distribute drugs); *United States v. Nickerson*, 669 F.2d 1016, 1022 (5th Cir., Unit B 1982) (marijuana importation conspiracy; shifting base of operations did not negate the general conspiratorial agreement), *United States v. Leach*, 613 F.2d 1295, 1299-1303 (5th Cir. 1980) (insurance fraud scheme), *United States v. Zicree*, 605 F.2d 1381, 1388 (5th Cir. 1979) (scheme to inflate medical bills), *United States v. Johnston*, 547 F.2d 282, 284-85 (5th Cir. 1977) (continuing bank fraud scheme involving the same techniques and having the fixed object to secure funds prior to the discovery of worthless checks), *United States v. Morado*, 454 F.2d 167, 171-72 (5th Cir. 1972), *cert. denied*, 406 U.S. 917 (1973) (election fraud scheme in which illegal acquisition of ballots made sense only if in conjunction with innumerable parties). Murgo used Attonito and Uzzi and their fake company as a tool for a while; then he used the Merchants Bank in an effort to forestall complaints, including the complaints of Rex Baker. When all else failed, Murgo claimed

La Spesa would find a new bank and would rescue his guileless investors. Murgo helped La Spesa look for another bank. La Spesa told Uzzi that he would honor the Merchants Bank's obligations to Baker and he told Uzzi that he would personally fund Baker if the bank did not provide assistance. He later told Baker the same thing. The Merchants Bank was utilized throughout the scheme to defraud Rex Baker by all of the defendants. What Judge Brown observed in the *Perez* case holds true for this case:

> "The record reflects careful planning and cooperation on the part of each of the persons involved in the conspiracy. We agree with the Seventh Circuit in *United States v. Palermo, supra* at 470, where they wrote that it would be 'a perversion of natural thought and of natural language to call such continuous cooperation a cinematographic series of distinct conspiracies, rather than to call it a single one'. In any event, in an instance such as the one presented by this case, with overlapping membership and activities all directed toward a common goal, most courts have found, as we do here, sufficient evidence to uphold a jury verdict reflecting a single conspiracy".

This was the position taken by the Court throughout the trial of this case. During the period between the verdicts and the sentencing, the Court waivered in its view. The Government urges the Court to reconsider this position in light of all the testimony. A broad reading of Rule 8(b), Federal Rules of Criminal Procedure (Fed.R.Cr.P.) is justified because discetionary severance pursuant to Rule 14, Fed.R.Cr.P., provides a vehicle to protect the defendant. *United States v. Bledsoe*, 674 F.2d 647, 655 (8th Cir. 1982). The facts of the instant case obviate the need for this canon of interpretation. The Government emphasizes the testimony of defendant Stephen Sarault, which established that La Spesa was involved in so-called loan decisions on many of the Murgo victims, that La Spesa was involved in the loan decision on Rex Baker, and that Murgo was referring these victims to the Merchants Bank

so that he could create the appearance of activity. To quote from Judge Brown again, "It only confounds the law to try to characterize this in the figure of spokes, wheels, hubs, rims or chains. (See note 11, supra). It was one big, and hopefully profitable enterprise, which looked toward successful frequent, but nonetheless, discreet repetitions and in which each participant was neither innocent nor unrewarded". *United States v. Perez*, 489 F.2d at 64. Beyond cavil, the defendant knew or should have known of the existence of a conspiracy and necessarily acted in furtherance of the purpose of that enterprise, an advanced fee scheme. A unified scheme and similar modus operandi establishes the "substantial identity of facts or participants" for permissible joinder under Rule 8(b), Fed.R.Cr.P. *See United States v. Leach*, 613 F.2d at 1299-1301.

(2) Assuming *arguendo* that more than one conspiracy existed, it would be error to enter judgments of acquittal. The holding in *United States v. Marionneaux*, 514 F.2d 1244 (5th Cir. 1975), *cert. denied*, 434 U.S. 1244 (1977), that denial of a Rule 8(b), Fed.R.Cr.P., motion to sever is reviewable as a matter of law does not equate to a rule of prejudice *per se*. The pivotal concern is whether the spillover of evidence from multiple conspiracies has tainted the specific defendant and affected the substantial rights of that particular individual. *Cf. United States v. L'Hoste*, 609 F.2d 796, 800-01 (5th Cir. 1980), *cert. denied* 449 U.S. 833 (1981) (addressing prejudice when the indictment charged one conspiracy and the evidence established two). Panels of this circuit do review the evidence adduced at trial to determine the propriety of a district court denial of a motion to sever pursuant to Rule 8(b), Fed.R.Cr.P. *See United States v. Leach*, 613 F.2d at 1299, n.1. *In the case sub judice, prejudice arising from jury confusion as to the facts is speculative at best.* All defendants were found not guilty as to Count Three. The jury members failed to agree as to the guilt or innocence of defendant Williams on Counts Four and Five and as to the guilt or innocence of defendant Mancini on Counts One and Three. Assuming the existence of

multiple conspiracies, these verdicts document the absence of the vice of multiple conspiracies, the possible transfer of guilt from one defendant to another. Reversible error is absent when the jury could segregate the evidence as to different counts and defendants. *See United States v. Nickerson*, 669 F.2d at 1022. This absence of jury confusion manifests that discretionary severance pursuant to Rule 14, Fed.R.Cr.P., was unnecessary.

(3) Accordingly, the Court's Memorandum Opinion and Order errs when finding that a conspiracy clearly existed among Beaulieu and Solomons, but nonetheless entering judgments of acquittal on the conspiracy charge. If Murgo, Beaulieu and Solomons were co-conspirators in the charged conspiracy, then the jury's verdicts of guilty should stand.

(4) A similarly critical ambiguity in the Memorandum and Order pertains to the substantive charges against Murgo and Gerhardt. *The Court concludes that Murgo and Gerhardt were clearly guilty and finds no substantive basis for setting aside the charges on the merits*. The Court proffers the sole problem to be that "the spillover effect of other evidence, especially that involving La Spesa, is bound to have had a devestating effect". Memorandum and Order at page 7. The United States submits that this conclusion is erroneous. The evidence against Murgo was so overwhelming and discreet that the jury could not have been influenced by any evidence pertaining to La Spesa. It would be surprising if the jury deliberated more than a moment or two on Murgo's guilt. Proof of multiple conspiracies does not necessarily undermine the conviction of the substantive counts. *See United States* v. *Klein*, 515 F.2d 751 (3rd Cir. 1975). Assuming *arguendo* that Murgo was somehow "prejudiced" by the spillover effect of other evidence, the only legally recognized remedy for such a defect is the granting of a new trial. *Cf. United States* v. *Camiel*, 689 F.2d 31 (3rd Cir. 1982) (rare instance where the "spillover" effect would inexorably infect a new trial). There is no authority for entering a judgment of acquittal notwithstanding a

guilty verdict under the circumstances of the instant case. Nonetheless, the Court's Order simply "sustains" motions for judgments of acquittal as to all counts in the Indictment, including the substantive counts against Murgo and Gerhardt. It is to be doubted whether the Court intended to enter a Rule 29 ruling as to these substantive charges, but as it stands now, this is exactly what the Order says. The Order should, at the very minimum, be modified.

(5) The Court's subsequent Supplemental Memorandum confirms that this Court never intended to enter judgments of acquittal on the substantive counts. The Court should therefore rescind or modify its Order. In *United States v. LoRusso*, 695 F.2d 45 (2nd Cir. 1982, *appeal docketed*, No. 82-1543, 51 U.S.L.W. 3726 (5 April 1983), the Second Circuit recognized the inherent power of a district court to modify an *interlocutory order* prior to entry of judgment. The interests of justice guided an interpretation of the Federal Rules of Criminal Procedure to permit a district court to modify an oral announcement dismissing a count pursuant to the defendant's motion for acquittal and to submit a lesser included offense of that count to the jury. The decision demonstrates the broad latitude of a district court to correct an error as in the case *sub judice* prior to the entry of judgment against the defendant. Jurisdiction lies with this Court as no appeal has been lodged. The specter of double jeopardy should not dissuade corrective action. It is clear beyond peradventure that an order or ruling setting aside a jury's finding of guilt is appealable and can be vacated notwithstanding the double jeopardy clause. *See, e.g., United States v. Wilson*, 420 U.S. 332 (1975); *United States v. Burns*, 597 F.2d 939 (5th Cir. 1979). This precedent indicates that this Court may properly rescind its earlier interlocutory order and reinstate the findings of guilt without violating the Double Jeopardy Clause.

(6) This Court should at the very minimum, if it does not intend to set aside its ruling entirely, vacate the judgments of acquittal and order new trials. Requiring Murgo and Gerhardt

to be retried, in the face of the overwhelming evidence of guilt already established, would itself be an injustice. It would be far more unjust for this Court to have intended to enter a new trial order, but to refuse to do so on some unwarranted assumption that it lacks authority to accomplish what it intended.

(7) An additional question exists as to Count One of the Indictment. The count alleged a substantive offense of mail fraud against Murgo, the two Saraults, Mancini, LaSpesa and Cally. The jury entered an unequivocal finding of guilt as to this charge. Without the slightest explanation in the Memorandum and Order, the Court "sustained" motions of judgments of acquittal notwithstanding the verdicts as to Count One as well as the other counts. The Court did not state the basis for the dismissal of Count One or the egregious error warranting entry of an acquittal order. The Memorandum and Order are silent as to these points. Certainly it does not suffice to say that the Court found "multiple conspiracies" to be in existence, whatever that may mean in the context of this case. The issue of multiple conspiracies is irrelevant to whether, viewed in the light most favorable to the United States, the evidence warranted submission of Count One to the jury as a substantive charge of mail fraud. The evidence properly established that the defendants engaged in a scheme to defraud Baker. This Court should promptly reinstate the mail fraud charge.

(8) The conclusion that motions to sever should have been granted "at least in part" is similarly unclear. The Order does not explain why a severance was mandated. Certainly, the fact that a severance may have been justified does not warrant the entry of a judgment of acquittal notwithstanding the verdict. What is more, the Memorandum and Order failed to explain why the Court concludes that motions to sever were appropriate. The decisive issue is not whether there were "multiple conspiracies". The issue is whether any of the charged defendants were members of the single conspiracy charged in the Indictment. The Court failed to address this is-

sue at all except to say that Murgo, Solomons and Beaulieu were clearly members of the charged conspiracy.

WHEREFORE, the United States of America hereby prays for a reconsideration of the Memorandum and Order of May 11, 1983 and, more specifically, for an Order setting aside the entry of judgments of acquittal notwithstanding the verdicts, or, alternatively:

(a) an Order specifically finding who was and who was not a member of the charged conspiracy;

(b) an Order reinstating the convictions of those defendants found to be members of the charged conspiracy, or, at the very least, granting a new trial as to those defendants;

(c) an Order reinstating all substantive counts of the Indictment.

Respectfully submitted,

ROBERT W. MERKLE
United States Attorney

By /s/ Thomas W. Turner
Thomas W. Turner

Managing Assistant U.S. Attorney
501 Federal Building
80 North Hughey Avenue
Orlando, Florida 32801
305/420-6341

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by mail this 10th day of June, 1983 to the following:

Joseph A. Rosier, Esquire
Post Office Box 1445
Longwood, Florida 32750

Gerald Jones, Jr., Esquire
335 East Semoran
Altamonte Springs, FL 32701

N. James Turner, Esquire
Post Office Box 3221
Orlando, Florida 32802

J. William Masters, II, Esquire
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22 East Pine Street
Orlando, Florida 32801

Elmo R. Hoffman, Esquire
215 East Central Avenue
Orlando, Florida 32801

H. Jay Stevens, Esquire
417 Federal Building
80 North Hughey Avenue
Orlando, Florida 32801

James W. Hart, Esquire
326 North Ferncreek Avenue
Orlando, Florida 32803

_____

Assistant United States Attorney

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA
Plaintiff

vs.

VICTOR E. MURGO, et al.,
Defendants.

CASE NO.:
82-67-Orl-Cr-06(H)

Orlando, Florida
Saturday, February 4, 1984
2:00 o'clock p.m.

APPEARANCES:
STEPHEN J. CALVACCA, ESQUIRE
Assistant United States Attorney
501 Federal Building
80 North Hughey Avenue
Orlando, Florida 32801

Appearing on behalf of the Government.

JAKE ARBES, ESQUIRE
Abbott & Arbes, P.C.
Suite 1000, Peachtree Center Tower
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

and

JOSEPH A. ROSIER, ESQUIRE
5104 North Orange Blossom Trail
Orlando, Florida 32804

Appearing on behalf of the Defendant Murgo.

TRANSCRIPT OF:

MOTION TO AMEND CONDITIONS OF TRAVEL

* * *

MR. ARBES: Again, there was a Motion for Recovery of Property; and again, that was based on the argument that he was totally acquitted. And I'm going to skip over that for the purposes of this hearing because you've asked me to do so, and I'll get straight to the Motion for Removal of Conditions Imposed on Release pending trial, or appeal.

Now, assuming arguendo that the Defendant is properly under bond, the argument of the Defendant is that conditions restricting the travel should be lifted, or at least amended, and the use of his passport be allowed.

Now, the Rules governing this type of Motion are found in the Rules of Appellate Procedure, Rule 9, and that Rule states that — and Rule 9 covers both Orders respecting release entered prior to Judgment of conviction, and also release pending appeal after Judgment of conviction.

So, the first problem — and I don't know if this really, frankly, makes a lot of difference — is whether you consider him on appeal bond or whether you consider him on pretrial bond.

I think Your Honor would recognize that — that's somewhat of an interesting question.

THE COURT: I'm afraid I would have to consider him as still on a trial bond.

* * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3648

IN RE:

VICTOR E. MURGO,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

---

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's petition for writ of prohibition/mandamus is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3648

IN RE:

VICTOR E. MURGO,

Petitioner.

Appeal from the United States District Court for the Middle District of Florida

---

Before TJOFLAT, VANCE and CLARK, Circuit Judges.

BY THE COURT:

Petitioner's motion for clarification of the order of October 15, 1984, is GRANTED. In denying Petitioner's Petition for writ of prohibition/mandamus, the court relied upon *United States v. Dieter*, 429 U.S. 1330, 97 S.Ct. 18 (1976), and similar cases.

C-3

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-3648

IN RE:

VICTOR E. MURGO,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Middle District of Florida

---

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Order of October 15, 1984)

Before TJOFLAT, VANCE, and CLARK, Circuit Judges.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Thomas A. Clark

United States Circuit Judge

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT
OFFICE OF THE CLERK
56 Forsyth Stree, N.W.
ATLANTA, GEORGIA 30303

SPENCER D. MERCER
CLERK

In Replying, give number
of case and names of parties

December 28, 1984

Mr. Jake Arbes
Abbott and Arbes, P.C.
Peachtree Center Tower, Suite 1000
230 Peachtree Street, N.W.
Atlanta, Georgia 30303

Re: 84-3648 IN RE: MURGO

Dear Mr. Arbes:

Pursuant to our telephone conversation, returned herewith is your application for stay of mandate pending certiorari. As I stated on the telephone, and as you know, an application for a writ of mandamus is an original action commenced in this court. Such applications are governed by Title V of the Federal Rules of Appellate Procedure and FRAP 21. Applications for writs under this title and rule are, by the terms of the rule, disposed of by order. Unless the court directs otherwise, no judgment is prepared and entered in such original proceedings as a matter of policy. A certified copy of the order of the court denying the application for the writ is issued in lieu of mandate. Under FRAP 41, no mandate issues unless a judgment is entered.

Finally, you should note that mandate is issued in order to return jurisdiction to the district court and to communicate the "judgment of appellate court to lower court, directing action

to be taken . . by trial court'' (Black's Law Dictionary, 5th Ed., mandate). In an original proceeding, there is no transfer of jurisdiction from the district court to the court of appeals, and there is, therefore, no need to return jurisdiction by issuance of mandate. Nor is there any need to direct action to be taken by a trial court when an application for a writ is denied.

In light of the foregoing, your application for stay of mandate pending certiorari is returned without action. This is, of course, no impediment to your seeking certiorari (see Supreme Court Rule 20.4).

SPENCER D. MERCER, CLERK

By: /s/ WARREN A. GODFREY
A. Godfrey
Operations Manager

WAG/MJC/sh

cc: Hon. Walter Hoffman
Robert Merkle